Supreme Court, U.S.
FILED

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No. _____

In The

# Supreme Court of the United States

THOMAS JOHNSTON,

*Petitioner,*

versus

TWENTY GRAND OFFSHORE, INC., ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Honorable Court Of Appeal, First Circuit, State Of Louisiana**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

(1). Whether a jury's finding that an injured seaman is *not* entitled to "further cure" is res judicata thus forever extinguishing the shipowner's duty to provide maintenance and cure, even if the seaman's injury subsequently worsens and the shipowner's unreasonable failure to provide "cure" at that point in time "robs" the injured seaman of curative treatment and eventually results in total and permanent disability; and, if not,

(2). Whether the injured seaman may bring "a new proceeding" – "a later suit" – under 46 U.S.C. § 688(a) (the Jones Act) and the General Maritime Law of the United States to recover full tort damages from the shipowner for the aggravation of his condition caused by the shipowner's unreasonable failure to provide maintenance and cure?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the Honorable Court of Appeal, First Circuit, State of Louisiana, whose judgment is sought to be reviewed are:

Thomas Johnston, Petitioner

Twenty Grand Offshore, Inc., Respondent

Tidewater Marine, Inc., Respondent

Pental Insurance Company, Ltd., Respondent

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## CITATIONS OF OPINIONS AND ORDERS

The judgment sought to be reviewed, i.e., the judgment of the Honorable Court of Appeal, First Circuit, State of Louisiana, entered in ***Johnston v. Twenty Grand Offshore, Inc.,*** Docket Number 97-CA-1948 (La. App. 1 Cir. 9/25/98)[1], the decision of said Court of Appeal, denying Petitioner's Application for Rehearing[2], the judgment[3] (affirmed on the aforementioned appeal) rendered by the Honorable Sixteenth Judicial District Court, Parish of St. Mary, State of Louisiana, in that certain civil action entitled ***"Thomas Johnston v. Twenty Grand Offshore, Inc., et al"***, Docket Number 99,211 "C", sustaining Respondents' Peremptory Exception of Res Judicata and dismissing Petitioner's claims with prejudice, and the order of the Honorable Supreme Court of Louisiana entered in ***Johnston v. Twenty Grand Offshore, Inc.,*** Docket Number 98-C-3133 (La. 2/5/99) (denying discretionary review of the Court of Appeal's judgment)[4] are not published in any official or unofficial reporter.

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[1] See Court of Appeal's judgment annexed hereto at App. 1-App. 8.

[2] See Court of Appeal's decision annexed hereto at App. 9.

[3] See District Court's judgment annexed hereto at App. 10-App. 11.

[4] See order of the Supreme Court of Louisiana annexed hereto at App. 12.

## STATEMENT OF THE BASIS FOR JURISDICTION

On February 5, 1999, the Supreme Court of Louisiana, the state court of last resort in Louisiana, entered an order denying discretionary review of the judgment of the Court of Appeal, First Circuit, State of Louisiana, which judgment violates substantial rights and privileges claimed by Petitioner under 46 U.S.C. § 688(a) (the Jones Act) and the General Maritime Law of the United States. Consequently, this Court now has jurisdiction to review the judgment of the Court of Appeal, First Circuit, State of Louisiana, under 28 U.S.C. § 1257(a), which effectuates its appellate jurisdiction granted by U.S.C. Const. Art. III, Section 2, cls. 1 and 2. See ***Garrett v. Moore-McCormack Co., Inc.***, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942) ("[w]here action under Jones Act for injuries sustained by seaman, and under admiralty law for maintenance and cure, was brought in Pennsylvania state court, ***whether state court proceeded in such a manner that all substantial rights of parties under controlling federal law would be protected raised a 'federal question' reviewable in the federal Supreme Court***"). Cf. ***South Buffalo Ry. Co. v. Ahern***, 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395 (1953). Under 28 U.S.C. § 2101(c) and Rule 13(1) of this Court's Rules, Petitioner has ninety days after entry of the order of the Supreme Court of Louisiana denying discretionary review of the aforementioned judgment, or until May 6, 1999, to file this Petition for a Writ of Certiorari, which has been timely filed.

## STATUTE INVOLVED IN THE CASE

The pertinent statute involved in this case is 46 U.S.C. § 688(a) (the Jones Act):

> **"§ 688. Recovery for injury to or death of seaman**
>
> (a) Application of railway employee statutes; jurisdiction
>
> ***Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;*** and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Emphasis added.)

## STATEMENT OF THE CASE

On February 3, 1997, Petitioner filed a Petition for Damages[5] in the Sixteenth Judicial District Court, Parish of St. Mary, State of Louisiana, instituting a civil action against Respondents under 46 U.S.C. § 688(a) (the Jones Act) and the General Maritime Law of the United States. In his Petition for Damages, Petitioner alleged, among other things, that: (a) he was injured on February 1, 1994, while employed as a seaman aboard that certain offshore supply vessel known as the *M/V El Toro Grande*; (b) on August 4, 1994, he instituted a civil action in the United States District Court for the Western District of Louisiana, seeking to recover damages, and maintenance and cure, from Respondents under 46 U.S.C. § 688(a) (the Jones Act) and the General Maritime Law of the United States; and, (c) on June 12, 1995, Petitioner's civil action was tried before a jury in said federal District Court. Petitioner further alleged that, upon conclusion of the federal trial, the jury returned a verdict, finding that: (a) Respondent, Tidewater Marine, Inc., was not negligent; (b) the aforementioned vessel was unseaworthy; (c) fault should be apportioned ten (10%) percent to Respondent, Tidewater Marine, Inc., and ninety (90%) percent to Petitioner; and, (d) Petitioner was entitled to damages in certain amounts for various items (all of which were reduced by ninety (90%) percent in light of the assessment of comparative fault against Petitioner). Finally, Petitioner alleged that the jury in the prior federal proceeding found that

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[5] See Petition for Damages annexed hereto at App. 13-App. 28.

Respondent, Tidewater Marine, Inc., did not owe Petitioner "further cure for the injury to his arm".[6]

In Paragraphs 13 through 21 of his Petition for Damages, Petitioner then set forth claims under 46 U.S.C. § 688(a) (the Jones Act) and the General Maritime Law of the United States for compensatory and/or consequential damages, punitive and/or exemplary damages and attorney's fees. Petitioner based these claims on an alleged worsening of his injury (that probably would have improved with curative treatment) occurring AFTER the federal trial and the aggravation of his condition caused by Respondents' unreasonable failure to provide maintenance and cure at that point in time. In particular, Petitioner alleged that approximately ***four and one-half (4 1/2) months AFTER the federal trial,*** his treating physician, Darrell Henderson, M.D., (Dr. Henderson) noted a marked worsening of Petitioner's injury brought on by the onset of winter. Dr. Henderson had repeatedly warned Respondents that such a worsening might occur, but his warnings fell on deaf ears. Because of Respondents' unreasonable failure to provide Petitioner with maintenance and cure at this point in time, his condition continued to deteriorate to the point where some ***nine (9) months AFTER the federal trial,*** Dr. Henderson rendered a medical diagnosis that Petitioner's injury had become permanent and therefore incurable.

The allegations of the Petition for Damages filed by Petitioner in the Louisiana District Court thus set forth a

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[6] See federal jury's verdict annexed hereto at App. 18-App. 22.

claim that: (a) a worsening of Petitioner's injury (that probably would have improved with curative treatment) occurring AFTER the federal trial gave rise to a duty on Respondents' part to provide Petitioner with maintenance and cure; (b) Respondents breached this duty; and, (c) Petitioner's condition was aggravated by Respondents' unreasonable failure to provide maintenance and cure. If given the opportunity by the state courts, Petitioner believes his evidence would prove that, beginning shortly AFTER the conclusion of the federal trial and continuing for approximately one (1) year thereafter, Petitioner's physical condition began to deteriorate, and continued to deteriorate at an ever quickening pace, to the point where medical treatment would no longer better his condition and that said aggravation of Petitioner's condition was a direct result of Respondents' unreasonable failure to provide maintenance and cure during this time period.

In bringing these claims against Respondents in the Louisiana District Court to recover full tort damages under either 46 U.S.C. § 688(a) (the Jones Act) or the General Maritime Law of the United States, Petitioner relied upon well-established federal jurisprudence, which holds that determinations regarding maintenance and cure must be limited to conditions as they exist at the time of trial and that injured seamen are permitted to bring serial suits to collect these benefits as they accrue. Petitioner premised his civil action on the theory that, if a duty on the part of a shipowner to provide maintenance and cure to an injured seaman is created by a worsening of his injury (that may improve with curative treatment) occurring AFTER a jury has determined that he is not

entitled to "further cure", then Petitioner must have a remedy to address Respondents' breach of that duty.

On April 29, 1997, Respondents filed a Peremptory Exception of Res Judicata[7] in the Louisiana District Court wherein they alleged that Petitioner's claims were barred by either state or federal principles of res judicata in light of the previous finding made by the federal jury that Petitioner was not entitled to "further cure". On May 16, 1997, Petitioner filed a Supplemental Memorandum in Opposition to Exceptions of Res Judicata[8] wherein Petitioner specifically cited this Court's jurisprudence, and jurisprudence of the United States Court of Appeals for the Fifth Circuit, which holds that determinations regarding maintenance and cure must be limited to conditions as they exist at the time of trial and the injured seaman may bring serial suits to collect these benefits as they accrue. Petitioner thus raised in the Louisiana District Court the federal questions he now seeks to have reviewed in this Court.

On May 19, 1997, the Louisiana District Court heard Respondents' Peremptory Exception of Res Judicata; and, upon conclusion of the hearing, it sustained said Exception and dismissed Petitioner's claims with prejudice. The Louisiana District Court subsequently granted Petitioner's timely motion for a devolutive appeal from its

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[7] See Respondents' Peremptory Exception annexed hereto at App. 29-App. 31.

[8] See Petitioner's Supplemental Memorandum with accompanying Exhibit "P-2" annexed hereto at App. 32-App. 49.

judgment. In his Original Brief on Behalf of the Appellant[9] filed in the Court of Appeal, First Circuit, State of Louisiana, Petitioner once again raised the aforementioned federal questions. On September 25, 1998, the Court of Appeal, First Circuit, State of Louisiana, rendered its judgment, affirming the judgment of the Louisiana District Court. Petitioner's subsequently filed Application for Rehearing was denied by the Louisiana Court of Appeal.

Petitioner then sought supervisory review of the judgment rendered by the Court of Appeal, First Circuit, State of Louisiana, by timely filing an Application for a Writ to Issue under the Supervisory Jurisdiction of the Supreme Court of Louisiana[10] wherein he again raised the federal questions sought to be reviewed in this Court. On February 5, 1999, the Supreme Court of Louisiana denied Petitioner's Application for a Writ to Issue under its Supervisory Jurisdiction in a one (1) word decision: "Denied."

## LAW AND ARGUMENT

### *(A). RULE 10 CONSIDERATIONS*

As shown below, the Court of Appeal, First Circuit, State of Louisiana, has decided an important federal

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[9] See excerpts from Original Brief annexed hereto at App. 50-App. 63.

[10] See excerpts from Application annexed hereto at App. 64-App. 80.

question (and the Supreme Court of Louisiana has denied discretionary review of that decision), i.e., a jury's finding that an injured seaman is not entitled to "further cure" is res judicata thus in effect forever extinguishing the shipowner's duty to provide maintenance and cure despite any subsequent changes (such as a worsening of his injury that may respond to curative treatment, advances in medical science, etc.), in a way that conflicts with numerous decisions of this Court, and all the maritime Circuits including the United States Courts of Appeals for the First, Second and Fifth Circuits, i.e., decisions which hold that determinations regarding maintenance and cure must be limited to conditions as they exist at the time of trial and that a seaman is permitted to bring serial suits to collect maintenance and cure benefits as they accrue. Further, the Court of Appeal, First Circuit, State of Louisiana, has decided an important question of federal law that has not been, but should be, settled by this Court, i.e., whether a seaman may bring "a new proceeding" – "a later suit" – under 46 U.S.C. § 688(a) (the Jones Act) and the General Maritime Law of the United States to recover full tort damages caused by a shipowner's breach of the duty to provide maintenance and cure, which duty is alleged to arise out of a worsening of his injury (that may improve with curative treatment) occurring AFTER a jury has determined that he is not entitled to "further cure". See ***Braxton v. United States***, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

## *(B). RES JUDICATA WILL NOT BAR MAINTENANCE AND CURE CLAIMS BASED ON A WORSENING OF A SEAMAN'S INJURY (THAT MAY IMPROVE WITH CURATIVE TREATMENT) OCCURRING AFTER A JURY HAS DETERMINED HE IS NOT ENTITLED TO "FURTHER CURE"*

***Calmar S.S. Corporation v. Taylor***, 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993 (1938), is the port of embarkation for the first leg of this journey, which Petitioner hopes will terminate in the safe harbor of judicial redress for the injuries he sustained as a result of Respondents' unreasonable failure to provide maintenance and cure. In ***Calmar S.S. Corporation***, supra, this Court established the legal principles that determinations regarding maintenance and cure must be limited to conditions as they exist at the time of trial and that injured seamen may bring serial suits to recover maintenance and cure benefits as they accrue. These legal principles support Petitioner's argument that res judicata is not applicable to maintenance and cure claims based on a worsening of a seaman's injury (that may improve with curative treatment) occurring AFTER a jury has determined that he is not entitled to "further cure". The precise question presented in ***Calmar S.S. Corporation***, supra, was:

> " . . . whether the duty of a shipowner to provide maintenance and cure for a seaman falling ill of an incurable disease while in its employ ***extends to the payment of a lump sum award sufficient to defray the cost of maintenance and cure for the remainder of his life.***" (Emphasis added.) Id. 303 U.S., 526, 58 S.Ct., 652.

*Calmar S.S. Corporation*, supra, first explained the nature of the duty of the shipowner to provide maintenance and cure to a seaman injured or falling ill in the service of its vessel and the amounts recoverable by the injured seaman therefor. After surveying the prior jurisprudence regarding the duty and its sources, *Calmar S.S. Corporation*, supra, proceeded to answer the question presented by fixing the duration of the shipowner's duty:

> "We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond ***a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment.***" (Emphasis added.) *Id.* at 303 U.S., 530, 58 S.Ct., 654.

*Calmar S.S. Corporation*, supra, then specifically disapproved of lump sum awards for maintenance and cure and noted the remedy available to the injured seaman for a worsening of his injury (that may improve with curative treatment) occurring AFTER a finding that he is not entitled to "further cure", holding:

> ***"The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained.***
>
> The courts below have made no findings sufficient to enable us to fix the amount which respondent is entitled to recover. The decree is

> accordingly reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion, and ***without prejudice to any later suit by respondent to recover maintenance and cure to which he may then be entitled.***" (Emphasis added.) *Id.* at 303 U.S., 531-532, 58 S.Ct., 655.

See also ***Vella v. Ford Motor Company***, 421 U.S. 1, 95 S.Ct. 1381, 43 L.Ed.2d 682 (1975) (***"the District Court correctly held that 'maintenance and cure continues until such time as the incapacity is declared to be permanent' "***); and, ***Salem v. United States Lines Company***, 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962).

***Calmar S.S. Corporation***, supra, thus specifically held that its decision and the decision of the lower court made pursuant thereto would be ***"without prejudice to any later suit by respondent to recover maintenance and cure to which he may then be entitled."*** Certainly, the most significant implication of this part of ***Calmar S.S. Corporation***, supra, is that said decision and the decision of the lower court ***would not support any plea of res judicata the shipowner might attempt to interpose in response to "any later suit" brought by the injured seaman "to recover maintenance and cure to which he may then be entitled."***

The right of an injured seaman to bring serial suits against a shipowner for the recovery of maintenance and cure was again described by this Court in ***Farrell v. United States***, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949), wherein this Court granted certiorari to determine, among other things, when the duty of a shipowner to furnish maintenance and cure to an injured seaman

terminates. On the one hand, the shipowner argued, and the court below held, that the duty of a shipowner to furnish maintenance and cure does not extend beyond the time when the maximum cure possible has been effected. On the other, the injured seaman argued that he was entitled to maintenance as long as he is disabled, which was for life. ***Farrell***, supra, answered the question by affirming the judgment of the lower court and holding that the duty of the shipowner to provide maintenance and cure to the injured seaman terminated when "he was so far cured as possible, . . . ". Id. 336 U.S., 518, 69 S.Ct., 711. ***Farrell***, supra, then expressly left open the possibility that the injured seaman could bring ***"a new proceeding"*** to recover maintenance and cure from the shipowner based on a worsening of his injury (that may improve with curative treatment) occurring AFTER a finding that he is not entitled to "further cure":

> ***"The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."*** (Emphasis added.) *Id.* at 336 U.S., 519, 69 S.Ct., 711.

In the case *sub judice*, this is precisely the claim Petitioner made in the civil action instituted in the Louisiana District Court, i.e., ***that a worsening of his injury occurring AFTER the federal jury found that he was not entitled to "further cure" would have responded to treatment of a curative nature offered by Dr. Henderson, but Respondents' unreasonable failure to provide maintenance and cure at that point in time rendered such treatment unavailable to Petitioner and aggravated his***

***condition to the point where he is now totally and permanently disabled.*** Petitioner sought full tort damages from Respondents based on this breach of their duty to provide maintenance and cure.

On numerous occasions, the lower federal courts, citing ***Calmar S.S. Corporation,*** supra, and ***Farrell,*** supra, have recognized that determinations regarding maintenance and cure must be limited to conditions as they exist at the time of trial and that injured seamen have a right to bring serial suits against a shipowner to recover maintenance and cure benefits as they accrue, including situations that involve a worsening of his injury (that may improve with curative treatment) occurring AFTER a finding that he is not entitled to "further cure". See, e.g., ***Calo v. Ocean Ships, Inc.,*** 57 F.3d 159 (2nd Cir. 1995) (***"[s]hould these injuries lead him to undergo further medical or surgical treatment, of a kind that is not simply palliative in nature, he may institute another action against OSI to recover the costs of such care"***); ***Clauson v. Smith,*** 823 F.2d 660 (1st Cir. 1987) (***"serial suits are permitted to collect benefits as they accrue"***); ***Cooper v. Diamond M. Company,*** 799 F.2d 176 (5th Cir. 1986), cert. denied, 481 U.S. 1048, 107 S.Ct. 2177, 95 L.Ed.2d 834 (1987) (***"[s]eamen have always been accorded the right to bring suit, including serial suits, to collect maintenance and cure benefits as they become due, . . . "***); ***Pelotto v. L & N Towing Company,*** 604 F.2d 396 (5th Cir. 1979) (***"[t]he rule of Res judicata (and collateral estoppel), recognizable in admiralty, is subject to the substantive limitation that seamen have always been accorded the right to bring serial suits to collect maintenance payments as they come due"***); and, ***Lirette v. K & B Boat***

*Rentals, Inc.*, 579 F.2d 968 (5th Cir 1978) (" . . . ***Calmar and other decisions have carefully preserved the seaman's right to bring serial suits to collect maintenance payments as they come due***").

The cited jurisprudence establishes beyond any doubt that a worsening of Petitioner's injury (that probably would have improved with curative treatment) occurring AFTER the federal jury found that he was not entitled to "further cure" could create a duty on Respondents' part to provide maintenance and cure to Petitioner such that res judicata would not bar "a new proceeding" – "a later suit" – by Petitioner therefor. The cited jurisprudence also constitutes "controlling federal law", which affords substantial rights to Petitioner. The Louisiana courts were bound to proceed in such a manner that all of Petitioner's substantial rights under this controlling federal law would be protected. See *Garrett*, supra. However, instead of protecting Petitioner's substantial rights under controlling federal law, ***the Louisiana courts proceeded to wrongfully and improperly destroy those rights by sustaining Respondents' Peremptory Exception of Res judicata***.

The affidavit and office notes[11] of Dr. Henderson annexed as Exhibit "P-2" to Petitioner's Supplemental Memorandum in Opposition to Exceptions [sic] of Res Judicata describe in detail and with particularity the aggravation of Petitioner's condition caused by Respondents' unreasonable failure to provide "cure". Dr.

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[11] See Dr. Henderson's affidavit and office notes annexed hereto at App. 40-App. 49.

Henderson is a physician licensed to practice medicine in the State of Louisiana, and his practice centers around the specialty of hand and wrist surgery. Dr. Henderson treated Petitioner for his injuries sustained in the service of Respondents' vessel beginning on June 27, 1994. On June 14, 1995, when Dr. Henderson testified on Petitioner's behalf at the federal trial, the condition of Petitioner's left upper extremity was static, and he had experienced a seventy-five (75%) percent to eighty (80%) percent remission of the neurological condition from which he suffered known as reflex sympathetic dystrophy. Perhaps, it was this information and testimony from Respondents' medical experts that Petitioner's condition, as it existed at that point in time, could not be improved by medical treatment that led the federal jury to find that Petitioner was not entitled to "further cure". In any event, Petitioner does not challenge this finding.

However, on August 28, 1995, ***approximately two and one-half (2 1/2) months AFTER the conclusion of the federal trial,*** Dr. Henderson examined Petitioner and became concerned that the onset of cold weather could trigger a rebound of the reflex sympathetic dystrophy that Petitioner had formerly experienced. At that time, Dr. Henderson felt that the most appropriate treatment ***to prevent the reoccurrence of this condition, to increase the function and mobility of Petitioner's left hand and wrist*** and to reduce the pain-precipitating irritants in those areas of his body was to proceed with surgery. Dr. Henderson had his staff contact Respondents' attorneys for approval of this treatment in accordance with their "cure" obligation, but said attorneys would not return the call.

On September 25, 1995, ***approximately three and one-half (3 1/2) months AFTER the conclusion of the federal trial,*** Dr. Henderson examined Petitioner and noted that cold weather accentuated the pain in his left arm and hand, which suggested the possibility of the imminent return of reflex sympathetic dystrophy. Once again, Dr. Henderson's staff contacted Respondents' attorneys and provided them with this information, but the response from said attorneys was that Respondents would not approve any surgery for Petitioner.

On October 30, 1995, ***approximately four and one-half (4 1/2) months AFTER the conclusion of the federal trial,*** Dr. Henderson examined Petitioner, and he noted the weather was wet and cold and Petitioner was experiencing a marked increase in the pain in his left arm. At that time, Dr. Henderson felt the chances were increasing for Petitioner to "experience a dramatic return of the reflex sympathetic dystrophy, which would greatly decrease the chances for ***the surgical improvement of his [left] hand.***" Dr. Henderson sounded the alarm that Petitioner was going to become totally and permanently disabled unless something was done to address his deteriorating medical condition. Again, Respondents chose to sit idly by and watch the slow destruction of Petitioner's chances for improvement.

On January 10, 1996, ***approximately seven (7) months AFTER the conclusion of the federal trial,*** Dr. Henderson examined Petitioner and noted that his prediction had come true, i.e., the cold weather had caused a recurrence of Petitioner's reflex sympathetic dystrophy. At that time, surgery was impossible because of the recurrence of this

condition. However, Dr. Henderson felt that with aggressive physical therapy and treatment by a pain management specialist, Petitioner could be returned to a state where curative surgery could be performed. In his office note of January 10, 1996, Dr. Henderson stated that ***Petitioner was beginning to enter the "atrophic phase of reflex sympathetic dystrophy" and that he would continue to go "downhill" without treatment***. Dr. Henderson then opined that ***"the chance of his hand deteriorating further is very definite and very clear unless something is done other than to totally ignore it and hope that it will go 'away."***

On March 13, 1996, ***approximately nine (9) months AFTER the conclusion of the federal trial***, Dr. Henderson examined Petitioner and found that the inevitable consequence of Respondents' unreasonable failure to provide Petitioner with "cure" had occurred, i.e., ***"I think he has reached a point where surgery will not have any chance at all of helping his arm."*** Dr. Henderson now recommended that Petitioner consider ***amputation*** of a significant portion of his left arm, if he could not stand the pain and discomfort. Dr. Henderson assigned Petitioner a one-hundred (100%) percent permanent partial disability of the left upper extremity, which would be enough to prevent Petitioner from engaging in any type of gainful occupation with the rest of his body. In essence, Petitioner had become totally and permanently disabled as a direct consequence of Respondents' unreasonable failure to provide maintenance and cure.

The foregoing are among the facts Petitioner alleged in his Petition for Damages filed in the Louisiana District

Court. Petitioner sought full tort damages for Respondents' breach of their obligation to provide him with maintenance and cure, which obligation arose out of the worsening of his injury (that probably would have improved with curative treatment) occurring AFTER the federal jury found that he was not entitled to "further cure". Under ***Calmar S.S. Corporation***, supra, and ***Farrell***, supra, the mere fact that the federal jury determined that Petitioner was not entitled to "further cure" at the time that trial was conducted would not support a plea of res judicata interposed in response to "a new proceeding" – "a later suit" – brought by Petitioner based on (a) a worsening of his injury (that probably would have improved with curative treatment) occurring AFTER that finding and (b) Respondents' unreasonable failure to provide maintenance and cure at that point in time. Consequently, the Louisiana District Court should have overruled Respondents' Peremptory Exception of Res Judicata; or, on appeal, the Louisiana Court of Appeal should have reversed the District Court's judgment that instead sustained said exception and dismissed Petitioners' claims with prejudice.

The first question presented by this Petition for a Writ of Certiorari is: "Whether a jury's finding that an injured seaman is *not* entitled to "further cure" is res judicata thus forever extinguishing the shipowner's duty to provide maintenance and cure, even if the seaman's injury subsequently worsens and the shipowner's unreasonable failure to provide "cure" at that point in time "robs" the injured seaman of curative treatment and eventually results in total and permanent disability?" As this Court should answer this question in the negative,

the question that remains is: "Whether the injured seaman may bring "a new proceeding" – "a later suit" – under 46 U.S.C. § 688(a) (the Jones Act) and the General Maritime Law of the United States to recover full tort damages from the shipowner for the aggravation of his condition caused by the shipowner's unreasonable failure to provide maintenance and cure?"

### *(C). PETITIONER HAS A REMEDY*

***The Iroquois***, 194 U.S. 240, 24 S.Ct. 640, 48 L.Ed. 955 (1904), is the port of embarkation for the second leg of this journey. In ***The Iroquois***, supra, this Court determined that a shipowner must act reasonably in providing maintenance and cure to an injured seaman; and, under the General Maritime Law of the United States, the shipowner could be held liable in damages for failing to so act. In making this determination, ***The Iroquois***, supra, noted the "real" question presented:

> " . . . ***whether the master, knowing*** his ignorance of surgery, the serious nature of the libellant's injury, the poor accommodations for him in the forecastle, the liability of inflammation setting in, and of the bones not uniting, the fact that he was to be carried through the tropics, where, to an invalid confined in the forecastle the heat would be almost intolerable, ***he should not, even at the sacrifice of a week, have put into Valparaiso and left the libellant there in charge of the American consul.***" (Emphasis added.) *Id.* at 194 U.S., 246, 24 S.Ct., 642-643.

*The Iroquois*, supra, then agreed with the lower courts' basis for requiring the shipowner to respond in damages to the injured seaman:

> "The courts below held that ***the master did not discharge, as he should have done, the claim of humanity which the serious nature of the injury and the helpless condition of the libellant imposed upon him.***" (Emphasis added.) *Id.* at 194 U.S., 247, 24 S.Ct., 643.

In the case ***sub judice***, the allegations of the Petition for Damages filed by Petitioner in the Louisiana District Court, if proved, would establish that Respondents similarly failed to "***discharge, as [they] should have done, the claim of humanity which the serious nature of the injury and the helpless condition of [Petitioner] imposed upon [them].***"

*Cortes v. Baltimore Insular Line*, 287 U.S. 367, 53 S.Ct. 173, 77 L.Ed. 368 (1932), provided this Court with the next opportunity to examine this area of the law. In *Cortes*, supra, this Court focused on 46 U.S.C. § 688(a) (the Jones Act) and its impact on the ancient rule that the injured seaman's remedy for a shipowner's breach of the duty to provide maintenance and cure ends with his death. *Cortes*, supra, would determine " . . . whether death resulting from the negligent omission to furnish care or cure is death from personal injury within the meaning of 46 U.S.C. § 688." *Id.* at 287 U.S., 372, 53 S.Ct., 174. Alluding to this Court's jurisprudence, which holds that 46 U.S.C. § 688(a) "is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings", *Cortes*, supra, answered the question:

> *"The failure to furnish cure is a personal injury actionable at the suit of the seaman during life, and at the suit of his personal representative now that he is dead."* (Emphasis added.) *Id.* at 287 U.S., 376, 53 S.Ct., 176.

See also ***Vaughn v. Atkinson***, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962) ("[w]hile ***failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows . . . , the recovery may also include 'necessary expenses'*** "); and, ***De Zon v. American President Lines***, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943).

Thus, this Court's jurisprudence unequivocally establishes that an injured seaman may bring an action under both the General Maritime Law of the United States (***The Iroquois***, supra, and its progeny) and 46 U.S.C. § 688(a) (the Jones Act) (***Cortes***, supra, and its progeny) to recover full tort damages from the shipowner for an aggravation of his condition caused by the shipowner's unreasonable failure to provide maintenance and cure. Certainly, the injured seaman cannot and does not lose this right merely because the shipowner's unreasonable failure to provide maintenance and cure happens in the context of a worsening of the seaman's injury (that may improve with curative treatment) occurring AFTER a jury has found that the seaman is not entitled to "further cure", rather than immediately following the injury sustained in the service of its vessel. Stated another way, no matter when the shipowner's duty to provide maintenance and cure arises, the injured seaman has a remedy for any breach thereof.

There are three (3) overarching legal precepts that should guide this Court's decision on the two (2) questions presented by this Petition for a Writ of Certiorari. The first legal precept was expressed by this Court many years ago in the colorful case of ***Robertson v. Baldwin***, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715 (1897), when it noted:

> "Indeed, ***seamen are treated*** by congress, as well as by the parliament of Great Britain, ***as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians***. 'Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares.' ***The ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly.***" (Emphasis added.) *Id.* at 165 U.S., 287, 17 S.Ct., 331.

See also ***Chandris, Inc. v. Latsis***, 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995) ("Justice Story identified this animating purpose behind the legal regime governing maritime injuries when he observed ***that seamen 'are emphatically the wards of the admiralty' because they 'are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour' "***).

The second legal precept relates specifically to the injured seaman's right to maintenance and cure, and it was first explicated by this Court in ***Aguilar v. Standard***

*Oil Company of New Jersey*, 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107 (1943):

> "There is strong ground therefore for regarding the right to maintenance and cure as covering injuries received without misconduct while on shore leave. Certainly ***the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf.***" (Emphasis added.) *Id.* at 318 U.S., 735, 63 S.Ct., 936.

See also ***Warren v. United States***, 340 U.S. 523, 71 S.Ct. 432, 95 L.Ed. 503 (1951).

The third legal precept relates specifically to 46 U.S.C. § 688(a) (the Jones Act), and it was first described by this Court in ***Cosmopolitan Shipping Company v. McAllister***, 337 U.S. 783, 69 S.Ct. 1317, 93 L.Ed. 1692 (1949):

> "***The Jones Act was welfare legislation*** that created new rights in seamen for damages arising from maritime torts. ***As welfare legislation, this statute is entitled to a liberal construction to accomplish its beneficent purposes.***" (Emphasis added.) (Emphasis added.) *Id.* at 337 U.S., 790, 69 S.Ct., 1321.

See also ***Cox v. Roth***, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260 (1955).

The second question presented by this Petition for a Writ of Certiorari is: "Whether the injured seaman may

bring "a new proceeding" – "a later suit" – under 46 U.S.C. § 688(a) (the Jones Act) and the General Maritime Law of the United States to recover full tort damages from the shipowner for the aggravation of his condition caused by the shipowner's unreasonable failure to provide maintenance and cure?" The aforementioned legal precepts combined with the well-established authorities cited herein lead to the ineludible conclusion that the second question presented by this Petition for a Writ of Certiorari should be answered in the affirmative.

## CONCLUSION

This Court's prior decisions cited herein establish that a worsening of a seaman's injury (that may improve with curative treatment) occurring AFTER a jury's finding that he is not entitled to "further cure" can create a duty on the part of a shipowner to provide maintenance and cure such that res judicata will not bar a claim by the injured seaman therefor. This Court's prior decisions cited herein further establish that an injured seaman may bring "a new proceeding" – "a later suit" – to recover full tort damages from the shipowner for an aggravation of his condition caused by the unreasonable failure of the shipowner to provide maintenance and cure. Petitioner's claims asserted against Respondents in the Louisiana District Court under 46 U.S.C. § 688(a) and the General Maritime Law of the United States are based on these prior decisions.

This Court's prior decisions constitute controlling federal law that affords substantial rights to Petitioner.

As such, the Louisiana courts were bound to proceed in such a manner that all of Petitioner's substantial rights under this controlling federal law would be protected. The determination of whether the Louisiana courts proceeded in such a manner raises a "federal question" reviewable in this Court. See *Garrett*, supra. Parenthetically, Petitioner's substantial rights under controlling federal law were not protected, but instead were wrongfully and improperly destroyed, by the judgment of the Court of Appeal, First Circuit, State of Louisiana, which affirmed the Louisiana District Court's judgment, sustaining Respondents' Peremptory Exception of Res Judicata and dismissing with prejudice Petitioner's claims.

This Court is this injured seaman's last hope for redress of the grievous injuries he sustained (an aggravation of his physical condition to the point that he is now totally and permanently disabled) as a direct result of Respondents' unreasonable failure to provide maintenance and cure. This Court's special solicitude for injured seamen expressed in numerous cases coming to its attention in the past cannot and should not countenance this wrong. The Louisiana courts should now be directed to hear and determine Petitioner's claims on their merits so that Petitioner will have his day in court with at least the opportunity to vindicate his substantial rights under controlling federal law.

WHEREFORE, PETITIONER RESPECTFULLY PRAYS that this Court summarily GRANT this Petition for a Writ of Certiorari and REVERSE the judgment of the Court of Appeal, First Circuit, State of Louisiana, with instructions that said Louisiana Court of Appeal REMAND the case to

the Louisiana District Court for a trial on the merits of Petitioner's claims.

Respectfully submitted:

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*Attorney for Petitioner,*
*Thomas Johnston*

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 97 CA 1948

THOMAS JOHNSTON

VERSUS

TWENTY GRAND OFFSHORE, INC.,
TIDEWATER MARINE, INC.
AND PENTAL INSURANCE COMPANY, LTD.

Judgment Rendered: September 25, 1998

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Appealed from the
16th Judicial District Court
In and for the Parish of St. Mary
[/s/ F,G,C] State of Louisiana
Suit Number 99,211

Honorable John E. Conery, Judge

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| | |
|---|---|
| Lawrence N. Curtis<br>Lafayette, LA | Attorney for<br>Plaintiff-Appellant<br>Thomas Johnston |
| Louis Simon II<br>Cade A. Evans<br>Lafayette, LA | Attorneys for<br>Defendants-Appellees<br>Twenty Grand Offshore,<br>Inc., et al. |

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BEFORE: FITZSIMMONS, GUIDRY, AND CHIASSON, JJ.[1]

GUIDRY, J.

The plaintiff, Thomas Johnston, appeals from the trial court's judgment, granting the peremptory exception of res judicata filed by Twenty Grand Offshore, Inc., Tidewater Marine, Inc. (Tidewater) and Pental Insurance Company, Ltd. (collectively, the defendants) and dismissing the plaintiff's suit with prejudice. We affirm.

## BACKGROUND INFORMATION

The plaintiff was employed as a seaman by Tidewater aboard the *MV El Toro Grande* (the vessel). On February 1, 1994, the plaintiff was injured while working aboard the vessel. Dr. Jeffrey C. Fitter, who diagnosed the plaintiff's injuries as a displaced fracture of the left radial shaft, treated the plaintiff for his injuries. Surgery was performed to repair the fracture and a laceration of the right hand. Thereafter, Dr. Darrell L. Henderson treated the plaintiff. In June of 1994, Dr. Henderson described the plaintiff's injuries as a compound fracture of the left radius and possible dislocation of the radial head at the elbow. Dr. Henderson recommended that the plaintiff undergo physical and occupational therapy and nerve conduction studies and electromyography. In November of 1994, Dr. Henderson recommended that further surgery be performed on the plaintiff's left arm. However, Tidewater did not approve the surgery. Surgery was

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[1] Judge Remy Chiasson, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

again recommended by Dr. Henderson in March, June and August of 1995, and January of 1996, but was not approved.

In the interim, on August 4, 1994, the plaintiff instituted a civil action against Tidewater in the United States District Court for the Western District of Louisiana (federal court), seeking to recover damages and maintenance and cure under the Jones Act (46 U.S.C. § 688) and the general maritime law of the United States (Johnston I). The plaintiff filed an amended complaint on January 25, 1995, to add Pental Insurance Company, Ltd., Tidewater's insurer, as a defendant in the suit.

Johnston I was tried on June 12, 1995, before a jury, and on June 16, 1995, the trial judge signed a judgment in accordance with the jury verdict. Pursuant to the judgment, the plaintiff's Jones Act, pre-judgment interest, and punitive damages claims were all dismissed with prejudice, and the plaintiff was awarded $53,000.00 in damages, plus interest thereon at the rate of 5.88 percent per annum from the date of the judgment until paid.[2] The

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[2] The jury awarded the following damages:

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|---|---|
| Damages from date of accident to date of trial: | |
| Loss of earnings | $36,000 |
| Fringe benefits | $ 1,000 |
| Future damages: | |
| Bodily injury, pain and suffering, disability, mental anguish and loss of capacity for enjoyment of life | $100,000 |
| Loss of earnings | 297,000 |
| Fringe benefits | 10,000 |
| Medicals | 89,000 |

plaintiff filed a motion for new trial claiming, among other things, that the jury's award of future medical expenses was inconsistent with the finding that the plaintiff was not entitled to maintenance and cure. This motion was granted in part, regarding the issue of past pain and suffering, and denied in part, with respect to all other issues, on the basis that the jury's verdict could be reconciled when considering the large amount of evidence at trial that the treatment sought by the plaintiff was merely palliative and not curative in nature. The plaintiff then appealed to the United States Court of Appeals, Fifth Circuit. In an unpublished opinion, the Fifth Circuit affirmed the lower court.

## PROCEDURAL HISTORY (JOHNSTON II)

On February 3, 1997, the plaintiff filed the present suit for damages against the defendants in state district court (Johnston II). In the petition, the plaintiff alleged that the failure of the defendants to approve and provide surgery for the plaintiff from November 1994, through January 1996, caused the plaintiff's left arm to reach a point where surgery would no longer benefit him. According to the petition, by March 13, 1996, the plaintiff's upper left extremity had been assigned a one hundred percent permanent, partial disability. The plaintiff further alleged that his mental and physical condition had continually worsened, that the defendants had no reasonable defense for denying liability, and that the

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The damages were then reduced by the plaintiff's percentage of fault, which equaled 90 percent.

plaintiff was entitled to compensatory and/or consequential damages and punitive damages from the defendant. On April 30, 1997, the defendants filed a peremptory exception of res judicata. In this exception, the defendants averred that the decision rendered by the federal court in Johnston I precluded the prosecution of Johnston II under Louisiana and/or federal rules of res judicata. On May 23, 1997, the trial court rendered judgment, granting the defendants' exception of res judicata, and dismissing the plaintiff's suit with prejudice. From this judgment, the plaintiff now appeals.

## ASSIGNMENTS OF ERROR

The plaintiff asserts the following assignments of error:

1. The trial court erred in rendering a judgment, despite the fact that no evidence was offered or introduced to support it.

2. The trial court erred in sustaining the defendants' exception of res judicata without examining the entire record in the first suit.

3. The trial court erred in concluding that the claims asserted by the plaintiff in this suit were adjudicated in the earlier, federal proceeding.

## DISCUSSION

All three assignments of error relate to the question of whether there was sufficient evidence before the trial court to support its decision that the plaintiff's claims had been adjudicated in Johnston I. We conclude that there was sufficient evidence.

When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of res judicata that must be applied. **Reeder v. Succession of Palmer,** 623 So.2d 1268, 1271 (La. 1993), *cert. denied,* 510 U.S. 1165, 114 S.Ct. 1191, 127 L.Ed.2d 541 (1994). The purpose of the doctrine of res judicata, whether federal or state, is to promote judicial efficiency and final resolution of disputes by preventing needless relitigation. **Terrebonne Fuel & Lube, Inc. v. Placid Refining Company,** 95-0654, 95-0671, p. 12 (La. 1/16/96), 666 So.2d 624, 631. Under federal res judicata law, a judgment bars a subsequent suit if all of the following tests are satisfied: 1) both cases involve the same parties; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior decision was a final judgment on the merits; and 4) the same cause of action is at issue in both cases. **Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.,** 666 So.2d at 633.

> [A] final judgment has the authority of res judicata only as to those issues presented in the pleadings and conclusively adjudicated by the court. It is readily apparent from a judgment which specifically grants or rejects a demand whether the matter has been adjudged. It is, of course, more difficult to make this determination when a judgment is silent as to a particular demand. In such cases, the court must examine not only the pleadings, but also the entire record of the first suit, to determine whether the relief sought in the second suit was adjudged in the earlier suit.

**Lowe v. Prejean,** 540 So.2d 436, 438 (La. App. 1st Cir. 1989) (citations omitted).

In Johnston I, the plaintiff specifically alleged in his complaint that he was entitled to maintenance and cure for the period of his disability in an amount of not less than $250,000.00. The jury verdict addresses these allegations. Specifically, the jury found from a preponderance of the evidence that Tidewater owed no further cure to the plaintiff for his injury. In the present action, the plaintiff specifically alleges that the defendants have a cure obligation to him. This is the same allegation that was advanced by the plaintiff in Johnston I and adjudicated in that matter. Therefore, the plaintiff is precluded from litigating this claim in state court.

The plaintiff's argument that the trial court had no evidence before it is without merit. Because the pleadings and the judgment in Johnston I specifically addressed the issue of maintenance and cure, the trial court only needed to look to them to determine if the issue had been adjudicated in Johnston I. There was no need to examine the entire record from that proceeding.

Furthermore, contrary to the plaintiff's argument that all the evidence was attached to the memorandum in support of the exception and thus not before the court, the Johnston I complaint and judgment were before the trial court in the present action. Copies of the complaint and the judgment were attached to the peremptory exception of res judicata filed by the defendants on April 30, 1997, and the peremptory and declinatory exceptions of lis pendens, prescription and laches filed by the defendants on March 17, 1997. Exceptions are pleadings that

are filed into the record. LSA-C.C.P. art. 852. Thus, the trial court properly considered the complaint and judgment from Johnston I to determine whether the present action was barred by res judicata.

## CONCLUSION

For the foregoing reasons, the trial court's judgment granting the defendants peremptory exception of res judicata, and dismissing the plaintiff's action, is affirmed. Costs of this appeal are assessed to the plaintiff, Thomas Johnston.

**AFFIRMED.**

NOT DESIGNATED
FOR PUBLICATION

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 97/CA/1948

THOMAS JOHNSTON

– VERSUS – Parish of St. Mary

TWENTY GRAND OFFSHORES, INC., TIDEWATER MARINE, INC. AND PENTAL INSURANCE COMPANY, LTD.

On application for Rehearing.

Rehearing DENIED

/s/ Brady M. Fitzsimmons
Brady M. Fitzsimmons

/s/ John Michael Guidry
John Michael Guidry

/s/ Remy Chiasson
Remy Chiasson

Filed NOV 20 1998

/s/ Christine L. Crow
Christine L. Crow, Clerk

| | |
|---|---|
| THOMAS JOHNSTON<br>VERSUS | 16th JUDICIAL DISTRICT COURT |
| TWENTY GRAND OFFSHORE, INC. and TIDEWATER MARINE, INC. and PENTAL INSURANCE COMPANY, LTD. | DOCKET NO.: 99211-"C"<br>PARISH OF ST. MARY<br>STATE OF LOUISIANA |

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JUDGMENT

(Filed May 23, 1997)

This matter came on for hearing on the 19th day of May, 1997 for consideration of a peremptory exception of res judicata and a motion for sanctions by Twenty Grand Offshore, Inc., Tidewater Marine, Inc., and Pental Insurance Company, Ltd. ("Tidewater").

Considering the pleadings, the evidence and the briefs filed by the parties;

IT IS HEREBY ORDERED that Tidewater's peremptory exception of res judicata is granted and Plaintiff's suit is dismissed, with prejudice, all costs of these proceedings to be borne by the plaintiff.

IT IS FURTHER ORDERED that Tidewater's request for sanctions is denied.

Franklin, Louisiana, this 23rd day of May, 1997.

/s/ John E. Conery
Honorable John E. Conery, Judge
16th Judicial District

APPROVED AS TO FORM:

| | |
|---|---|
| /s/ Lawrence N. Curtis | /s/ Louis Simon II |
| Lawrence N. Curtis | Louis Simon II |
| Attorney for Plaintiff | Attorney for Defendants |

**The Supreme Court of the State of Louisiana**

**THOMAS JOHNSTON**

**VS.** NO. 98-C - 3133

**TWENTY GRAND OFFSHORE, INC., TIDEWATER MARINE, INC. AND PENTAL INSURANCE COMPANY, LTD.**

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IN RE: Johnston, Thomas; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of St. Mary 16th Judicial District Court Div. "C" Number 99,211; to the Court of Appeal, First Circuit, Number CA97 1948

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**February 5, 1999**

Denied.

CDT

WFM

HTL

CDK

JPV

JTK

JOHNSON, J. not on panel.

Supreme Court of Louisiana
February 5, 1999

/s/ John Tarlton Olivier
Clerk of Court
For the Court

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SIXTEENTH JUDICIAL DISTRICT COURT
PARISH OF ST. MARY
STATE OF LOUISIANA

THOMAS JOHNSTON

VERSUS DOCKET NUMBER: 99211 "C"

TWENTY GRAND OFFSHORE, INC.
and TIDEWATER MARINE, INC.
and PENTAL INSURANCE COMPANY, LTD.

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PETITION FOR DAMAGES

(Filed Feb. 5, 1997)

NOW INTO COURT, comes Thomas Johnston, hereinafter sometimes referred to as "Plaintiff", petitioning against Twenty Grand Offshore, Inc., Tidewater Marine, Inc. and Pental Insurance Company, Ltd., hereinafter referred to as "Defendants", this being a claim for compensatory and/or consequential damages, punitive and/or exemplary damages and attorney's fees under the Jones Act (46 U.S.C. Section 688) and the general maritime law of the United States secondary to Defendant's refusal to provide cure without a reasonable defense and with callousness and indifference to Plaintiff's plight, and, for his cause of action, Plaintiff respectfully shows and represents unto this Honorable Court as follows:

1.

Plaintiff is a resident of the State of Louisiana, domiciled in Allen Parish.

2.

Defendants, Twenty Grand Offshore, Inc. and Tidewater Marine, Inc., (hereinafter collectively Tidewater) are domestic corporations, organized and existing by virtue of the laws of the State of Louisiana, and it may be cited to appear and answer herein by serving their registered agent for service of process; namely, S.O.P., Inc., 1440 Canal Street, Suite 2100, New Orleans, Louisiana.

3.

Defendant, Pental Insurance Company, Ltd., is thought to be a foreign insurance company, organized under the laws of a State other than Louisiana, but licensed to do and doing business in this Parish and State and may be cited to appear and answer herein by serving its statutory agent for service of process; namely, Hon. Walter "Fox" McKeithen, Secretary of State, 3851 Essen Lane, Baton Rouge, Louisiana 70809.

4.

At all times mentioned herein, Defendant was the owner and operator of that certain offshore supply vessel known as the *MV El Toro Grande*, and Defendant utilized this vessel on the navigable waters of the Gulf of Mexico and the territorial waters of the State of Louisiana. Defendant was also the owner and operator of certain docking facilities located at Amelia, St. Mary Parish, Louisiana.

5.

On February 1, 1994, Plaintiff was employed as an able-bodied seaman by Defendant, and Plaintiff was permanently assigned to work with and aboard the *MV El Toro Grande*. Plaintiff performed his work as an able-bodied seaman for Defendant on the *MV El Toro Grande*, and he contributed to the mission and Purpose of this vessel.

6.

On February 1, 1994, while the *MV El Toro Grande* was docked at Defendant's dock in Amelia, St. Mary Parish, Louisiana, Plaintiff, in the course of his employment and pursuant to orders, was caused to sustain serious and permanent injuries and damages to his mind and body.

7.

Plaintiff was initially treated for his injuries mentioned in the preceding paragraph by Jeffrey C. Fitter, M.D., (Dr. Fitter) who diagnosed Plaintiff's injuries as a displaced fracture of the left radial shaft. Dr. Fitter performed surgery on Plaintiff described as an open reduction and internal fixation of the left radial shaft fracture and repair of a laceration to Plaintiff's right hand. Plaintiff subsequently left Dr. Fitter's care, choosing to have Darrell L. Henderson, M.D., (Dr. Henderson) function as his treating physician.

8.

On June 27, 1994, Plaintiff's injuries sustained in the accident aboard the *MV El Toro Grande* were described by Dr. Henderson as a compound fracture of the left radius and possible dislocation of the radial head at the elbow. At that time, Dr. Henderson recommended that Plaintiff be started on a very vigorous course of physical and occupational therapy. Dr. Henderson further recommended that Plaintiff immediately undergo nerve conduction studies and electromyography by a neurologist. Throughout the entire period of time mentioned in this petition, Plaintiff did not have the means or facilities by which to procure the treatments recommended by Dr. Henderson.

9.

On August 10, 1994, Dr. Henderson became concerned that Plaintiff was beginning to exhibit symptoms of reflex sympathetic dystrophy. For this reason, Dr. Henderson referred Plaintiff to Paul Hubbell, M.D., (Dr. Hubbell) for stellate ganglion blocks. Thereafter, on November 9, 1994, Dr. Henderson found that Dr. Hubbell had successfully treated Plaintiff's reflex sympathetic dystrophy, and Dr. Henderson recommended that further surgery be immediately performed on Plaintiff's left arm to address Plaintiff's continuing complaints of pain and loss of function in said arm. Defendant refused to approve the surgery being recommended by Dr. Henderson; and, on January 23, 1995, Dr. Henderson warned that Plaintiff's reflex sympathetic dystrophy would probably return without surgical intervention.

10.

On March 29, 1995, Dr. Henderson sounded additional warnings regarding the probable return of Plaintiff's reflex sympathetic dystrophy, if the surgery he was recommending was not performed in the near future. Dr. Henderson's warnings were given as Plaintiff was being seen by Ladislas Lazaro, III, M.D., for a second opinion at Defendant's insistence. Dr. Henderson continued to voice these warnings in medical reports copies of which were sent to Defendant.

11.

Meanwhile, on August 4, 1994, Plaintiff instituted a civil action against Defendant in the United States District Court for the Western District of Louisiana, seeking to recover damages and maintenance and cure from Defendant under the Jones Act (46 U.S.C. Section 688) and the general maritime law of the United States. Plaintiff's original complaint for damages used to institute the aforementioned civil action alleged that his injuries were caused by Defendant's negligence, the unseaworthiness of the *MV El Toro Grande,* Defendant's breach of its obligation to provide Plaintiff with a safe place to work and/or Defendant's willful and reckless violation of its duty to furnish and maintain a seaworthy vessel.

12.

On June 12, 1995, the trial of Plaintiff's civil action against Defendant commenced before a jury in the United States District Court for the Western District of Louisiana.

Upon conclusion of the trial and after deliberation, the jury returned with a verdict, as follows:

JUDGMENT

"This action came on for trial before the Court and a Jury, District Judge John M. Shaw, presiding, and the issues having been duly tried, and the Court having instructed the Jury to make answer to certain special interrogatories, and the Jury having duly rendered their verdict and having made answer to the special interrogatories as follows:

1. Do you find from a preponderance of the evidence that Tidewater Marine was negligent in the manner claimed by the plaintiff, and that such negligence was a legal cause of damage to Thomas E. Johnston under the standards given to you in regard to the Jones Act claim?

Answer Yes or No: No

(Note: If you answered "No" to Question One, skip Question Two and proceed to answer Question Three.)

2. If you answered "Yes" to Question One, do you find from a preponderance of the evidence that Thomas E. Johnston was himself negligent in the manner claimed by Tidewater Marine and that such negligence was a legal cause of his own damages under the standards given to you in regard to the Jones Act claim?

Answer Yes or No: _____

3. Do You find from a preponderance of the evidence that the vessel was unseaworthy in the manner claimed by plaintiff and that such unseaworthiness was a legal cause of damages

to Thomas E. Johnston under the standards given to you in regard to the unseaworthiness claim?

Answer Yes or No: Yes

(Note: If you answered "No" to both Questions One *and* Three, skip Questions Four through Nine and proceed to answer Question Ten.)

4. If you answered "Yes" to Question three, do you find from a preponderance of the evidence that Thomas E. Johnston was himself negligent in the manner claimed by Tidewater Marine and that such negligence was a legal cause of his own damages under the standards given to you in regard to the unseaworthiness claim?

Answer Yes or No: Yes

(Note: If you answered "No" to both Questions Two *and* Four, skip Question Five and proceed to answer Question Six.)

5. If you answered "Yes" to Questions Two and/or Four, what proportion or percentage of Thomas E. Johnston's damages do you find from a preponderance of the evidence to have been legally caused by the fault of the respective parties?

Answer in Terms of Percentages:

Tidewater Marine (defendant) ------ 10 %
Thomas E. Johnston (plaintiff) ------ 90 %

(Note: The total of the percentages given in your answer should equal 100%.)

6. Without regard to any percentages that you may have given in answer to Question Five,

state the entire amount of damages sustained by Thomas E. Johnston as a result of the accident *from the date of the alleged accident to the date of trial.*

A. Bodily injury, pain and suffering, disability, mental anguish and loss of capacity for the enjoyment of life ---------- $ 0

B. Loss of earnings ---------- $ 36,000

C. Fringe benefits ---------- $ 1,000

7. Without regard to any percentages that you may have given in answer to Question Five, state the entire amount of damages to be experienced by Thomas E. Johnston as a result of the accident *in the future after this trial.*

Answer in Dollars:

A. Bodily injury, pain and suffering, disability, mental anguish and loss of capacity for the enjoyment of life ---------- $ 100,000

B. Loss of earnings ---------- $ 297,000

C. Fringe benefits ---------- $ 10,000

D. Medicals ---------- $ 89,000

(Note: If you answered "Yes" to Question One, *or* answered "no" to Question three, skip Questions Eight and Nine, and proceed to answer Question Ten.)

8. If you answered "No" to Question One and "Yes" to Question Three, do you find from a

preponderance of the evidence that the Plaintiff is entitled to an award of pre-judgment interest?

Answer Yes or No: No

(Note: If you answered "No" to Question eight, skip Question Nine and proceed to answer Question Ten.)

9. If you answered "Yes" to Question Eight, state the date on which you determine that pre-judgment interest is due.

Date: _____

10. Do you find from a preponderance of the evidence that Tidewater Marine owes Thomas E. Johnston further cure for the injury to his arm?

Answer Yes or No: No

(Note: If you answered "No" to Question Ten, your deliberations are concluded.. Sign and date your verdict form and return to the courtroom.)

11. Do you find from a preponderance of the evidence that Tidewater Marine was unreasonable in failing to pay for the surgery by Dr. Henderson or delaying payment to Dr. Berard, and such failure or delay caused further injury or damage to Thomas E. Johnston?

Answer Yes or No: _____

(Note: If you answered "No" to Question Eleven, your deliberations are concluded. Sign and date your verdict form and return to the courtroom.)

(Note: If you answered "Yes" to Questions One and/or three, skip Question

Twelve and proceed to answer Question Thirteen.)

12. If you answered "Yes" to Question Eleven, *and* answered "No" to both Questions One and three, what amount of compensatory damages do you find from a preponderance of the evidence to have been caused by the failure to Tidewater Marine to pay for the surgery of Dr. Henderson or the delay on paying the bill of Dr. Berard?

Answer in Dollars: $_____

13. Do you find from a preponderance of the evidence that Tidewater Marine was arbitrary. and capricious or willful, callous and persistent in failing to authorize the surgery of Dr. Henderson and/or delaying the payment of Dr. Berard?

Answer Yes or No: _____

(Note: If you answered "No" to Question Thirteen, your deliberations are completed. Sign and date your verdict form and return to the courtroom.)

14. If you answered "Yes" to Question Thirteen, state the entire amount of punitive damages, if any, to be awarded to Thomas E. Johnston as a result of defendant's arbitrary and capricious failure to authorize the payment of Dr. Henderson's surgery, and/or delaying in payment of Dr. Berard.

Answer in Dollars: $_____

SO SAY WE ALL.

The district court subsequently entered judgment on the jury's verdict and said judgment is now on appeal to the United States Court of Appeals for the Fifth Circuit.

13.

On June 26, 1995, following the conclusion of the federal trial mentioned in the preceding paragraph, Plaintiff was examined by Dr. Henderson, who once again recommended that Plaintiff undergo surgery to address the pain and loss of function in his left arm. Dr. Henderson continued his efforts to get approval from Defendant for the surgery, which treatment Defendant was required to provide Plaintiff in accordance with its cure obligation.

14.

On August 28, 1995, Plaintiff was examined by Dr. Henderson, who stated in his medical report of that date that the approach of winter was Particularly dangerous for a person with Plaintiff's medical problems since: *"Cold weather could very easily trigger a rebound of the severe reflex sympathetic dystrophy that he had formerly."* Dr. Henderson again opined: *"I think the best way to prevent this is to try to proceed with surgery that has been talked about in so many notes and previous deposition."* Defendant continued to ignore these warnings from Dr. Henderson.

15.

On January 10, 1996, Plaintiff was examined by Dr. Henderson, Who monitored Plaintiff's condition throughout that winter. Dr. Henderson noted that Plaintiff's left

hand was practically useless now. Dr. Henderson further noted that Plaintiff was experiencing a recurrence of reflex sympathetic dystrophy. At that time, Dr. Henderson felt that Plaintiff was entering the atrophic phase of reflex sympathetic dystrophy and that Plaintiff's condition would continue to deteriorate, if some form of treatment was not immediately instituted. According to Dr. Henderson, the anticipated results of the surgery he had been recommending for Plaintiff all along were much poorer than in 1994. However, Dr. Henderson also described the alternative: *"the chance of this hand deteriorating further is very definite and very clear unless something is done other than to totally ignore it and hope that it will go away."* Defendant responded to this information as it had done in the past by refusing to approve any further treatment for Plaintiff.

16.

On March 13, 1996, Dr. Henderson examined Plaintiff at which time said physician noted that the inevitable result of Defendant's failure and/or refusal to provide cure had occurred, i.e., Plaintiff had reached the point where surgery would no longer be of any benefit. At that time, Dr. Henderson stated that Plaintiff would have to consider amputation of all or a portion of his left arm, if he could not tolerate the pain and discomfort he was experiencing in said arm. Dr. Henderson then assigned Plaintiff a one hundred (100%) percent permanent, partial disability of the left upper extremity.

17.

From the date on which the federal trial of Plaintiff's claims against Defendant concluded through the present, Plaintiff continually made demands upon Defendant for cure to treat his mental and physical injuries, arising out of the accident that occurred on February 1, 1994. Defendant refused to respond to these demands and to comply with its cure obligation.

18.

From the date on which the federal trial of Plaintiff's claims against Defendant concluded through the present, plaintiff's mental and physical condition has continually worsened, deteriorated and been aggravated as a result of Defendant's refusal to provide Plaintiff with cure. In connection with Plaintiff's demands for cure, Defendant has been provided with all medical reports from Dr. Henderson and his treating psychologist, Michael Berard, Ph.D. Thus, Defendant was continually and systematically informed of the worsening, deterioration and aggravation of Plaintiff's mental and physical condition, but Defendant with great callousness and indifference failed and/or refused to provide Plaintiff with cure during this time period.

19.

Plaintiff has incurred hospital, medical and pharmaceutical expenses in the past, in connection with the injuries he sustained as a result of Defendant's refusal to provide cure, and he anticipates hospital, medical and

pharmaceutical expenses in the future for which he is entitled to recover an amount reasonable in the premises.

20.

Plaintiff further itemizes his damages suffered because of Defendant's refusal to provide cure as follows; namely, past and future physical pain and mental anguish, loss of enjoyment of life, and past and future permanent disability and loss of earning capacity for which he is entitled to recover an amount reasonable in the premises.

21.

Defendant lacks a reasonable defense in denying liability for the payment of cure to Plaintiff and it has exhibited callousness and indifference to Plaintiff's plight. Thus, defendant is also liable to plaintiff for punitive damages in an amount sufficient to punish Defendant for its conduct and to deter others from such conduct in the future. Further, Defendant is liable to plaintiff for all attorney's fees incurred by Plaintiff in the prosecution of his claims for cure in an amount reasonable in the premises.

22.

That, at all times relevant herein, Defendant, Pental Insurance Company, Ltd., had in force and effect a policy or policies of insurance insuring, among others, Tidewater, for the cause of action asserted herein, and, as such,

are directly liable to your Plaintiff under the terms and provisions of the Louisiana Direct Action Statute.

WHEREFORE, PLAINTIFF RESPECTFULLY PRAYS FOR judgment in his favor and against Defendants for compensatory and/or consequential damages in an amount reasonable in the premises, punitive and/or exemplary damages in an amount sufficient to punish Defendants for its wrongful conduct and to deter others from engaging in such conduct in the future and all attorney fees incurred by Plaintiff in prosecuting his claims for cure and damages, together with judicial interest on those amounts from date of judicial demand until paid and all court costs.

CURTIS & LAMBERT
(A Professional Law Corporation)
201 Rue Iberville, Suite 300
Post Office Box 80247
Lafayette, Louisiana 70598-0247
Telephone: (318) 235-1825

BY: /s/ Lawrence N. Curtis
LAWRENCE N. CURTIS (4678)

SHERIFF PLEASE SERVE DEFENDANTS:

Twenty Grand Offshore, Inc. and
Tidewater Marine, Inc.,
Through their registered agent for
service of process:
S.O.P., Inc.
1440 Canal Street, Suite 2100
New Orleans, Louisiana

Pental Insurance Company, Ltd.
Through its statutory agent for
service of process:
Hon. Walter "Fox" McKeithen
Secretary of State
3851 Essen Lane
Baton Rouge, Louisiana

| | |
|---|---|
| THOMAS JOHNSTON | 16th JUDICIAL DISTRICT COURT |
| VERSUS | DOCKET NO.: 99211 – "C" |
| TWENTY GRAND OFFSHORE, INC. and TIDEWATER MARINE, INC. and PENTAL INSURANCE COMPANY, LTD. | PARISH OF ST. MARY |
| | STATE OF LOUISIANA |

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**PEREMPTORY EXCEPTION OF RES JUDICATA**

Defendants, Twenty Grand Offshore, Inc., Tidewater Marine, Inc. and Pental Insurance Company (hereinafter referred to as "Exceptors"), appearing solely for the purpose of this exception, and do hereby except to the plaintiff's suit and petition on the following grounds:

1.

As shown by the attached copies of the Complaint and Judgment in "Thomas E. Johnston v. Tidewater Marine Service, Inc. and Tidewater Marine, Inc.," C.A. No. 94-1451, U.S.D.C., W.D. La., the cause of action asserted herein arises out of the same transaction or occurrence (injury to plaintiff's arm) and is between the same parties in the same capacities (Johnston as plaintiff and Twenty Grand, Tidewater and Pental as defendants) as the federal court proceeding.

2.

The decision rendered by the United States Court of Appeals for the Fifth Circuit on the same transaction or

occurrence and between the same parties in the same capacities, precludes the prosecution of this action under Louisiana Code of Civil Procedure article 425, Louisiana Revised Statute 13:4231, and/or the federal rules of res judicata.

3.

Exceptors contend that the present suit is not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and has caused a needless increase in the cost of litigation. Exceptors therefore pray for reasonable expenses incurred, including a reasonable attorney fee, pursuant to article 863 of the Louisiana Code of Civil Procedure.

WHEREFORE, Exceptors pray that this exception be maintained, and that plaintiff's suit be dismissed at plaintiff's cost.

Respectfully submitted,

LABORDE & NEUNER

/s/ Louis Simon II
Louis Simon II – #12281
Cade A. Evans – #24405
One Petroleum Center,
Suite 200
1001 West Pinhook Road
Post Office Drawer 52828
Lafayette, Louisiana
70505-2828
Telephone: (318) 237-7000

**CERTIFICATE**

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been forwarded to all counsel of record by depositing a copy of same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 29th day of April, 1997.

/s/ Louis Simon II

**SIXTEENTH JUDICIAL DISTRICT COURT**
**PARISH OF ST. MARY**
**STATE OF LOUISIANA**

**THOMAS JOHNSTON**

**VERSUS**

**TWENTY GRAND OFFSHORE, INC. and TIDEWATER MARINE, INC. and PENTAL INSURANCE COMPANY, LTD.**

**DOCKET NUMBER: 99,211 "C"**

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**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO EXCEPTIONS OF RES JUDICATA**

MAY IT PLEASE THE COURT:

Tidewater's arguments in support of its exception of res judicata are founded on two fallacious assumptions. *First,* Tidewater incorrectly infers that the jury in the earlier federal trial found that Plaintiff had reached maximum medical improvement. *Second,* Tidewater erroneously concludes that such a finding would bar subsequent claim for cure. Neither premise can be supported.

The jury interrogatory form that was used in the federal proceedings did not ask the jury to determine whether Plaintiff had reached maximum medical improvement, and the answers to the interrogatories do not indicate that such a finding was made. In Interrogatory No. 7, the jury was asked in to determine the amount of Plaintiff's future medical expenses. As Tidewater noted in its memorandum, the $89,000.00 that the jury

awarded for future medicals corresponds to Dr. Henderson's highest estimate of the cost of the surgical procedure that he was recommending. Later, in Interrogatory No. 10, the jury was asked "Do you find from a preponderance of the evidence that Tidewater Marine owes Thomas E. Johnston *further cure* for the injury to his arm?"

The jury had been cautioned by Judge Shaw that if they awarded medical expenses under Plaintiff's Jones Act or unseaworthiness claims, they could not give him double recovery by also awarding those amounts under his cure claim. In light of that cautionary instruction, the jury in all likelihood interpreted the question regarding "further cure" to mean medical expenses *in addition to* the $89,000.00 that had already been awarded. Nevertheless, Judge Shaw and the Fifth Circuit chose to reconcile the jury verdict by attributing to the jury a finding that the surgery recommended by Dr. Henderson would be merely palliative.

The federal courts were unconcerned by the fact that the jury had not been informed that cure could not be awarded if it was merely palliative, as opposed to being curative.[1] They were equally undeterred by the fact that no evidence was presented by Tidewater to establish that the surgical [sic] recommended by Dr. Henderson would be palliative, as opposed to curative. Tidewater's expert, Dr. Lazaro, never said that the surgical procedure would

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[1] The Fifth Circuit assumed that the jury must have been aware of that fact, since Webster's New Collegiate Dictionary defines cure as "to restore to health."

be palliative. His testimony was that he did not recommend that the procedure be performed, because he felt that the prospects of success were not good enough to offset the risk that it would precipitate a recurrence of the reflex sympathetic dystrophy. His opinion in that regard was summed up in his following testimony:

> Q So in your mind that concept here – at least one of the things that you're saying is that in this instance we can't get a win, so therefore the risk outweighed the benefit for the surgery?
>
> A That's right. In other words, you know, you have to look at what you stand to gain against what you stand to lose. In his situation, he's not going to gain a normal extremity. *I think that would be worth a great – a shot, just to put it bluntly, but I don't think that he's got a good shot, so those are considerations.*"[2]

Even if the jury could reasonably have found on the basis of Dr. Lazaro's testimony that the surgery recommended by Dr. Henderson would have been merely palliative, that is not tantamount to a finding that Plaintiff had reached maximum medical improvement, as Tidewater suggests. Dr. Lazaro's opinions and recommendations were based on his findings from his single examination of Plaintiff. Subsequent changes in Plaintiff's condition might have changed his opinion.

Attached to this Memorandum as Exhibit P-2 is an affidavit from Dr. Henderson reflecting his examinations

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[2] A complete transcript of Dr. Lazaro's testimony has been marked for identification as "P-1" and attached to this Memorandum.

and treatment of Plaintiff subsequent to the federal trial. Copies of Dr. Henderson's progress notes, which were prepared contemporaneously with the visits are attached to the affidavit. As the affidavit and progress notes show, Plaintiff's condition deteriorated progressively, demonstrating a need for prompt surgical intervention to prevent permanent, irreversible loss of function in Plaintiff's left hand.

According to Dr. Henderson, the changes that he noted in Plaintiff's condition after the federal trial indicated that surgical intervention was medically necessary, that the risks associated with the procedure were outweighed by the potential benefits to be derived from it, and that the procedure was reasonably calculated to restore function and reduct disability in Plaintiff's left upper extremity, as opposed to being merely palliative. Dr. Henderson further stated in his affidavit that the changes that he noted in Plaintiff's condition were factors that a surgeon exercising the appropriate degree of professional judgment and providing the applicable standard of care would have taken in to consideration in evaluating, or re-evaluating, Plaintiff's need for surgery.

Unfortunately, Tidewater turned a deaf ear and refused to engage in any further investigation of Plaintiff's need for medical treatment. It did not ask Dr. Lazaro or any other physician to re-evaluate Plaintiff's need for surgery and the potential benefits to be derived from it in light of the changes in his condition subsequent to the federal trial. Tidewater took the intractable position that the jury's finding that Plaintiff was not entitled to "further cure" on June 15, 1995 precluded Plaintiff from ever asserting another claim for cure and relieved it of the

obligation to investigate such a claim. The jurisprudence clearly does not support that position.

In *Farrell v. United States*, 336 U.S 511, 69 S.Ct. 707, 1949 A.M.C. 613 (1949), the United States Supreme Court affirmed a judgment denying maintenance and cure to a seaman, who had been blinded and suffered post-traumatic convulsions, which were expected to become more frequent and could not be cured. The Court rejected arguments for making maintenance and cure permanent and held that the seaman was entitled to maintenance and cure "only until he was so far cured as possible." However, in doing so, the Supreme Court made the following observation:

> "Indeed the custom of providing maintenance and cure in kind and concurrently with its need has had the advantage of removing its benefits from danger of being wasted by the proverbial improvidence of its beneficiaries. *The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it.*" [emphasis added].

69 S.Ct. at 711.

Gilmore and Black summarized the Supreme Court's holding in *Farrell*, as follows:

> "Neither Taylor nor Farrell sets any time limit on the duration of the shipowner's liability, so long as there is a chance of improvement of the claimant's condition. The majority opinion in Farrell seems to take the position that 'cure' means improvement, or the possibility of improvement, and that Farrell could not recover

> medical expenses necessary to maintain him in his present condition without further deterioration; this position was bitterly attacked by the four dissenting justices. On the other hand the majority opinion assumed (and with this the dissenting justices would have agreed) that if, at a future time, by reason of advances in medical knowledge, it should become possible to ameliorate Farrell's condition, he would then be entitled to an additional recovery. The shipowner's liability thus appears to be unlimited in time and can be revived, with respect to an apparently hopeless case, by new discoveries which make the resumption of treatment advisable."

Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty*, Second Edition, § 6-11, pp. 299-300.

While the surgery that Dr. Henderson recommended after the federal trial was not a new form of treatment, subsequent changes indicated that its potential benefits were greater than Dr. Lazaro felt that they were based on his single examination of Plaintiff in 1985. The reflex sympathetic dystrophy did not spontaneously resolve, as Dr. Lazaro suggested that it might. It got worse, as Dr. Henderson predicted that it would. The certainty that he would suffer the permanent, irreversible loss of use of his left upper extremity and permanent disabling pain should have been weighed against the possibility of improvement of function through surgery, which even Dr. Lazaro had acknowledged to be "worth a shot."

It is well-settled in the jurisprudence that in evaluating claims for maintenance and cure, all doubts must be resolved in favor of the seaman. *Vaughan v. Atkinson*, 369 U.S 527, 532, 82 S.Ct. 997, 1000, 8 L.Ed.2d 88 (1962);

*Johnson v. Marlin Drilling Co.*, 893 F.2d 77 (5th Cir. 1990); *Noble Drilling Corporation v. Smith*, 412 F.2d 952, 958 (5th Cir. 1969). The jurisprudence also clearly establishes that a Jones Act employer has a continuing obligation to investigate such claims. For example, in *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984), the Fifth Circuit affirmed an award of damages for wrongful failure to pay maintenance and cure even though the employer had had the seaman examined by four doctors, who could find nothing wrong with him. The court concluded that the jury had not erred in finding that the employer was arbitrary and capricious, because it refused to reinstate maintenance and cure or investigate further after receiving a report from a fifth doctor, who had diagnosed the seaman's ailment.

If a court's refusal to award future maintenance and cure was res judicata, as Tidewater contends, and such a finding relieved a Jones Act employer of the obligation to investigate subsequent claims, the Supreme Court's holding in *Farrell* would be rendered meaningless. An injured seaman would be forever barred from establishing that medical treatment was available, which could improve his condition. The end would [sic] result would be exactly what has occurred in this case. Because of Tidewater's recalcitrance, the opportunity to improve Plaintiff's condition and avoid permanent disability has been forever lost. He had a partially functioning hand, which was susceptible to being improved, but because he was denied the medical treatment that he needed, his hand is now frozen and atrophied, and it will eventually have to be amputated.

This is clearly not what the Supreme Court envisioned when it decided *Farrell*. Tidewater's position is at war with the fundamental principles underlying the ancient remedy of maintenance and cure. The exception of res judicata should therefore be denied.

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Post Office Box 80247
Lafayette, Louisiana 70598-0247
Telephone: (318) 235-1825

BY: /s/ Lawrence N. Curtis
LAWRENCE N. CURTIS
(4678)

**CERTIFICATE**

I HEREBY CERTIFY that the foregoing has this day been served upon all counsel of record by placing a copy of same in the United States mail, postage prepaid and properly addressed.

Lafayette, Louisiana this 16th day of May, 1997.

/s/ Lawrence N. Curtis
LAWRENCE N. CURTIS

**PLAINTIFF'S EXHIBIT P-2**

**SIXTEENTH JUDICIAL DISTRICT COURT**
**PARISH OF ST. MARY**
**STATE OF LOUISIANA**

**THOMAS JOHNSTON**

**VERSUS**

**TWENTY GRAND OFFSHORE, INC. and TIDEWATER MARINE, INC. and PENTAL INSURANCE COMPANY, LTD.**

**DOCKET NUMBER: 99,211 "C"**

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**AFFIDAVIT**

STATE OF LOUISIANA
PARISH OF LAFAYETTE

BEFORE ME, the undersigned Notary Public, personally came and appeared Darrell L. Henderson, M.D., who being first duly sworn, deposed and said:

1.

That, he is a physician licensed to practice medicine by the State of Louisiana, and he practices in the area of hand and wrist surgery.

2.

That, Affiant has treated Thomas Johnston for injuries to his left upper extremity on a regular and routine basis since June 27, 1994, his most recent examination of Mr. Johnston having taken place on April 23, 1997.

3.

That, on June 14, 1995, when Affiant gave testimony in the matter of "Thomas E. Johnston v. Tidewater Marine Services, et al.," Civil Action No. 94-1451, United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, the condition of Thomas Johnston's left upper extremity was static. He experienced a seventy-five to eighty percent remission of a neurological condition known as reflect sympathetic dystrophy.

4.

That, when Affiant examined Thomas Johnston on August 28, 1985, he felt that the onset of cold weather could very easily trigger a rebound of the reflex sympathetic dystrophy that Mr. Johnston had formerly experienced and that the best way to prevent it was to proceed with a surgical procedure to increase mobility and reduce pain-precipitating irritants in his left hand and wrist. A progress note reflecting those findings and conclusions was prepared contemporaneously with that visit and maintained as part of Affiant's regular business records, a copy of which has been marked for identification as "Henderson-1" and is attached to this affidavit.

5.

That, when Affiant next examined Thomas Johnston on September 25, 1995, cold weather had accentuated the pain in his arm and hand, suggesting the possibility of the imminent return of his reflex sympathetic dystrophy.

A member of Affiant's staff contacted the offices of Louis Simon, II, attorney-at-law, to determine whether his client, Tidewater Marine, Inc., would authorize the surgical procedure and was advised that authorization was denied. A progress note reflecting those findings and conclusions was prepared contemporaneously with that visit and maintained as part of Affiant's regular business records, a copy of which has been marked for identification as "Henderson-2" and is attached to this affidavit.

6.

That, when Affiant next examined Thomas Johnston on October 30, 1995, it was a cold, wet day, and the weather was markedly increasing the pain in his arm. Affiant was of the opinion that there was an increasing chance that Mr. Johnson was going to experience a dramatic return of the reflex sympathetic dystrophy, which would greatly decrease the changes for surgical improvement of his hand. The impression was recorded in a progress note prepared contemporaneously with that visit and maintained as part of Affiant's regular business records, a copy of which has been marked for identification as "Henderson-3" and is attached to this affidavit.

7.

When Affiant next examined Thomas Johnston on January 10, 1996, he found the cold weather during the preceding month had caused a recurrence of his sympathetic reflex dystrophy, which was evidenced by a temperature differential between his hands. Although the recurrence of the sympathetic reflex dystrophy precluded

surgical intervention at that time, Affiant felt that aggressive treatment of it by Dr. Hubbell, whose treatment had resulted in its earlier remission, might make future surgical intervention possible and prevent further deterioration of the hand. A progress note reflecting those findings and conclusions was prepared contemporaneously with that visit and maintained as part of Affiant's regular business records, a copy of which has been marked for identification as "Henderson-4" and is attached to this affidavit.

8.

That, when Affiant next examined Thomas Johnston on March 13, 1996, he found that he had a considerable amount of atrophic changes of the reflex sympathetic dystrophy in his left hand with further restriction of its movement, the extent of which eliminated any chance of improving his condition through surgical intervention. In other words, by March 13, 1996, Affiant was of the opinion that Thomas Johnston's medical condition had progressed from a static condition, to a dynamic condition requiring medical treatment in response to rapid deterioration of his left upper extremity, to one in which effective medical treatment to restore function was no longer possible. A progress note reflecting those findings and conclusions was prepared contemporaneously with that visit and maintained as part of Affiant's regular business records, a copy of which has been marked for identification as "Henderson-5" and is attached to this affidavit.

9.

That, the changes that Affiant noted in Thomas Johnston's condition after June 14, 1995 indicated that surgical intervention was medically necessary, that the risks associated with the procedure were outweighed by the potential benefits to be derived from it, and that such a procedure was reasonably calculated to restore function and reduce disability in Thomas Johnston's left upper extremity, as opposed to being merely pallative.

10.

That, the changes that Affiant noted in Thomas Johnston's condition after June 14, 1995 were factors that a surgeon exercising the appropriate degree of professional judgment and providing the applicable standard of care would have taken into consideration in evaluating, or re-evaluating, Thomas Johnston's need for surgery.

/s/ Darrell L. Henderson, M.D.
DARRELL L. HENDERSON, M.D.

SWORN TO AND SUBSCRIBED before me this 16th day of May, 1997.

/s/ Gregory K. Klein
NOTARY PUBLIC

**EXHIBIT**

**HENDERSON-1**

OUTPATIENT VISIT 8/28/95
RE: Thomas Johnston
No: 30259-6

Mr. Johnston is in the office today. He tells me that he has still not heard of any approval for his surgery. My secretary tried to call Laborde a Neuner's office to talk with Mr. Simon and all she could do was leave a message with Vicky to ask someone to return her call to try to get the information regarding the approval.

I'm really worried about this man having a dramatic worsening of his symptoms with the onset of winter. Cold weather could very easily trigger a rebound of the severe reflex sympathetic dystrophy that he had formerly. I think the best way to prevent this is to try to proceed with the surgery that has been talked about in so many notes and previous deposition. Otherwise, his hand is just about the same. I went to see him in one month.

DLH/er DARRELL L. HENDERSON, M.D.

**EXHIBIT**

**HENDERSON-2**

OUTPATIENT VISIT 9/25/95
RE: Thomas Johnston
No: 30259-6

Mr. Johnston is in the office today for routine follow up. His left upper extremity is basically the same as it was the last time, and really without any ability to use it at all. He tells me that the decision whether he can have surgery

is still in the hands of the court at this time. We have not heard anything else. We contacted Mr. Louis Simon's office and was told that we could not carry out any surgery on him. I, therefore, think that our hands are tied as far as being able to help Mr. Johnston at this time. We will continue to follow him at monthly intervals. The cold weather has accentuated the pain in his arm and hand. I certainly hope that this does not cause tremendous recurrence of his reflex sympathetic dystrophy. See in one month.

DLH/er DARRELL L. HENDERSON, M.D.

**EXHIBIT**

**HENDERSON-3**

OUTPATIENT VISIT 10/30/95
RE: Thomas Johnston
No: 30259-6

Mr. Johnston is in the office today. It is a cold, wet day outside and this type of weather is markedly increasing the pain in this man's arm. It is very agonizing for me to see this man in all the discomfort, pain and suffering that he is going through, with accentuation of the pain with the cold weather, and to be totally helpless to not be able to operate on him and make him better. I think as each month goes by, there is more and more chance that he is going to get a dramatic return of the reflex sympathetic dystrophy and the chances for surgical improvement are going to be much less. He cannot use this hand at all. I feel he is going to be totally and permanently disabled from carrying out any type of activities whatsoever because of the pain. I cannot see how he should be able to

work in any capacity. I would like to see him in two months.

DLH/er DARRELL L. HENDERSON, M.D.

**EXHIBIT**

**HENDERSON-4**

OUTPATIENT VISIT 1/10/96
RE: Thomas Johnston
No: 30259-6

Mr. Johnston is in my office today for evaluation. The cold weather we have had in the last month has really been devastating for his hand. He is wearing a splint. His hand is really practically useless now. The splint is cutting into the forearm and causing a lot of edematous pits in the forearm. The hand and arm are cooler compared to the opposite hand. In my opinion, he is having a recurrence of his reflex sympathetic dystrophy which is related to the cold and to the lack of treatment that he has had.

It was November 1994 when I recommended that he have surgery and this was after Dr. Hubbell had carried out really magnificent work to this man and had totally reversed his reflex sympathetic dystrophy; but, there have been extensive delays since I recommended his surgery and the surgery has never been approved.

If his surgery would be magically approved at this time, it could not be done now because the extremity is in too bad a shape. In order for it to be done, he would need to start back on an intensive course of physical and occupational therapy along with intensive treatment by Dr. Hubbell. Mr. Johnston states he is still taking pain medication

that Dr. Hubbell is giving him; but, he really has not seen Dr. Hubbell for several months. The hand is basically not being used. He is beginning to get the atrophic phase of reflex sympathetic dystrophy and I think that this hand is going to continue to go downhill and cause him an inordinate amount of pain and suffering if something is not going to be done. I think that the anticipated results of surgery are not nearly as good as they were in 1994 and I think that the chance of success is much poorer, but the chance of this hand deteriorating further is very definite and very clear unless something is done other than to totally ignore it and hope that it will go away. I would like to see him in about two months. He tells me another court hearing is scheduled in the near future; perhaps, something might be able to be done at that time.

DLH/er DARRELL L. HENDERSON, M.D.

**EXHIBIT**

**HENDERSON-5**

OUTPATIENT VISIT 3/13/96
RE: Thomas Johnston
No: 30259-6

Mr. Johnston is in the office today. His left upper extremity continues to deteriorate and is quite a bit worse than when I saw him on January 10, 1996. He has a considerable amount of atrophic changes of the reflex sympathetic dystrophy in this hand. He mainly can keep the hand pronated and cannot supinate it to 0 at all and can only get it up to about 45 degrees from full pronation. He has pain throughout the forearm on touch of the wrist.

I think he has reached a point where surgery will not have any chance at all of helping his arm. He has a 100% permanent partial disability of the left upper extremity and I think it is enough to prevent him from carrying out any type of gainful occupation at all with the rest of his body. I think that his pain and discomfort in this arm will probably continue to deteriorate as time goes on and his pain will become more severe. If it ever gets to the point where it is bothering him so much that he cannot stand the pain or discomfort, he may want to consider an amputation of a significant portion of this extremity. This is something I think he will have to consider as time goes on. He is not seeing anyone now except Dr. Berard.

Since we have passed the time of surgery when I thought there would have been an excellent chance of getting some function in this man's hand, I don't think there is really much of anything I can do at this time. I would like to continue to see him at quarterly intervals to see how he progresses. I would like to see him in 3 months.

DLH/er DARRELL L. HENDERSON, M.D.

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

NUMBER: 97CA1948

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THOMAS JOHNSTON,

Plaintiff-Appellant

versus

TWENTY GRAND OFFSHORE, INC.,
TIDEWATER MARINE, INC. AND
PENTAL INSURANCE COMPANY, LTD.,

Defendants-Appellees.

---

APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT, PARISH OF ST. MARY, STATE OF LOUISIANA, THE HONORABLE JOHN E. CONERY, JUDGE PRESIDING

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ORIGINAL BRIEF ON BEHALF OF PLAINTIFF-APPELLANT, THOMAS JOHNSTON

---

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Attorneys for Plaintiff-Appellant

* * *

In his original Petition for Damages in these proceedings, Plaintiff did not pray for any damages arising out of his initial injury on February 1, 1994. The petition alleges that *subsequent to* the trial of the federal court proceedings, Plaintiff's treating physician, Dr. Darrell Henderson, diagnosed a recurrence of reflex sympathetic dystrophy secondary to Plaintiff's original injury. Despite repeated warnings from Dr. Henderson that Plaintiff needed immediate surgical treatment to prevent a total loss of function in his left hand, Tidewater steadfastly refused to authorized [sic] this necessary medical treatment, or to pay the future medical expenses, which were awarded by the jury in the federal court proceedings. As a result of his failure to receive prompt and adequate medical treatment, Plaintiff's condition is now irreversible, and Dr. Henderson has assigned him a one hundred (100%) percent permanent, partial disability of his left upper extremity.

## ASSIGNMENTS OF ERROR

(1) The District Court erred in rendering a judgment, despite the fact that no evidence whatsoever was offered or introduced in support of it.

(2) The District Court erred in sustaining the Defendants' exception of res judicata without examining the entire record in the first suit.

(3) The District Court erred in concluding that the claims asserted by Plaintiff in this lawsuit were adjudicated in earlier, federal proceedings.

## ARGUMENT

### I. THE STANDARD OF REVIEW.

The District Court's ruling on an exception of res judicata is reviewed under the manifest error standard, at least insofar as the court's underlying factual findings are concerned. *Higgins v. State, Department of Health & Human Services*, 451 So.2d 142 (La.App.1st Cir. 1984); *Alredge v. Whitney*, 591 So.2d 1201 (La.App.2nd Cir. 1991); *Aetna Casualty & Surety Co. v. Landry*, 578 So.2d 537 (La.App.3rd Cir. 1991). In this case, however, there is no evidence in the record to be reviewed under that, or any other standard. As a matter of law, there is an insufficient evidentiary basis for the District Court's judgment. However, even if the documents in the record were sufficient to support a judgment, the District Court's implicit finding that the issues in the two lawsuits were the same would be clearly wrong.

* * *

be addressed briefly below. As will appear from that discussion, the facts that Defendants rely upon in support of their exception cannot be gleaned form the pleadings. The testimony actually presented to the jury in the federal proceedings must be reviewed, and it would be inappropriate to consider only selected portions of the testimony in making critical findings of fact.

## III. THE DISTRICT COURT ERRED IN FINDING THAT THE ISSUES PRESENTED IN THIS LAWSUIT WERE ADJUDICATED IN THE EARLIER FEDERAL PROCEEDINGS.

Federal law determines the res judicata effect of judgments rendered by federal courts. *Pilié & Pilié v. Metz*, 547 So.2d 1305 (La. 1989). "Under federal law, res judicata does not apply unless the party claimed to be barred had 'a full and fair opportunity' to litigate the claim in the first action." *Benton, Benton & Benton v. Louisiana Public Facilities Authority*, 95-1367 (La.App.1 Cir. 4/4/95), 672 So.2d 720, 722 (citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)).

The federal jurisprudence recognizes the seaman's right to bring serial suits to collect maintenance and cure as it becomes due. *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993 (1938); *Lirette v. K & B Boat Rentals, Inc.*, 579 F.2d 968 (5th Cir. 1978). This is so, because awards of future maintenance and cure are limited to "such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period, which can be definitely ascertained." *Calmar*, 303 U.S. at 531, 58 S.Ct. at 655.

In *Pelotto v. L & N Towing Co.*, 604 F.2d 396 (5th Cir. 1979), the Plaintiff brought a second action for maintenance and cure after obtaining a judgment in an earlier Jones Act and unseaworthiness suit. The district court sustained the Defendants' exception of res judicata, but the United States Court of Appeals for the Fifth Circuit reversed, holding:

> "In applying the doctrines of *res judicata* and collateral estoppel to this suit for maintenance and cure, however, the District Judge failed to account for the peculiar nature of the maintenance and cure remedies. First, maintenance and cure for the future are ordinarily not awarded in a lump sum. The award may 'cover future maintenance and cure of a kind and for a period definitely ascertained or ascertainable. . . .' *Calmar S.S. Corp. v. Taylor, supra,* 303 U.S. at 530-31, 58 S.Ct. at 654. Since the defendants were satisfying all of Pelotto's maintenance and cure claims as of the date of his initial trial, Pelotto's only possible maintenance and cure claims at that time would have been either (I) an action for definitely ascertainable *future* maintenance and cure – an action which defendants do not claim as possible; or (ii) an action asking for a declaration that payments be made until Pelotto reach maximum cure – an action of very doubtful utility to Pelotto. *See Lirette v. K & B Boat Rentals, Inc.*, 5 Cir., 1978, 579 F.2d 968, 970. Thus *res judicata* does not preclude the present action." *Id.* at 401.

Later, in *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1360 (5th Cir. 1987), the Fifth Circuit again recognized the right of a Plaintiff in a Jones Act suit to bring a second action for maintenance and cure, holding:

> "Garijak shall continue to pay maintenance and cure until, in the opinion of Morales's treating physician, additional treatment will probably not improve the condition of Morales's writs. At that time, Garijak may discontinue maintenance and cure payments, *subject to Morales's right, however, to seek a resumption of payments if he can*

> *show adequate cause for such action.*" [emphasis added].

In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1511 (5th Cir. 1995) (on rehearing), the Fifth Circuit explained that there are two types of maintenance and cure actions:

> "The tort-like type involves a personal injury; i.e., *typically a worsening of the seaman's physical or mental health caused by the failure to provide maintenance, or more likely, cure.* The contract-like type need not involve a personal injury (although it may); it need only involve the loss of a monetary outlay." [emphasis added].

The original Petition for Damages in these proceedings alleges a tort-like claim for damages resulting from Tidewater's wrongful failure to provide cure since the judgment was rendered in the federal proceedings. The damages that Plaintiff seeks do not arise out of the same transaction or occurrence as the damages that he was awarded in the earlier federal proceedings. He is not seeking general damages for the pain and suffering associated with his initial injury, nor is he seeking the cost of the surgical treatment that Dr. Henderson was recommending at the time of the federal trial. It is too late for that treatment now. He is therefore asking to be compensated for the permanent disability resulting form Tidewater's wrongful failure to provide it.

The occurrence, or series of occurrences, out of which his present claims arise is the repeated refusal of Tidewater to provide necessary medical treatment. The claims, which were litigated in the earlier federal court proceedings arose out of an entirely different occurrence – the

accident on February 1, 1994 and the negligence and unseaworthy conditions, which gave rise to it.

Tidewater argues that the federal judgment is nevertheless *res judicata*, because it reflects a jury finding that Plaintiff had reached maximum medical cure. Tidewater erroneously concludes that such a finding would bar a subsequent claim for cure. In the first place, there is no basis in the record of the federal proceedings for concluding that the jury found that Plaintiff had reached maximum medical cure. Furthermore, even if such a finding could reasonably be attributed to the jury, it would no [sic] have the legal effect that Tidewater suggests.

The jury interrogatory form that was used in the federal proceedings did not ask the jury to determine whether Plaintiff had reached maximum medical improvement, and the answers to the interrogatories do not indicate that such a finding was made. In Interrogatory No. 7, the jury was asked in to determine the amount of Plaintiff's future medical expenses. The $89,000.00 that the jury awarded for future medicals corresponds to Dr. Henderson's highest estimate of the cost of the surgical procedure that he was recommending. Later, in Interrogatory No. 10, the jury was asked "Do you find from a preponderance of the evidence that Tidewater Marine owes Thomas E. Johnston ***further cure*** for the injury to his arm?"

The jury had been cautioned by Judge Shaw that if they awarded medical expenses under Plaintiff's Jones Act or unseaworthiness claims, they could not give him double recovery by also awarding those amounts under his cure claim. In light of that cautionary instruction, the

jury in all likelihood interpreted the question regarding "further cure" to mean medical expenses ***in addition to*** the $89,000.00 that had already been awarded. Nevertheless, Judge Shaw and the Fifth Circuit chose to reconcile the jury verdict by attributing to the jury a finding that the surgery recommended by Dr. Henderson would be merely palliative.

The federal courts were unconcerned by the fact that the jury had not been informed that cure could not be awarded if it was merely palliative, as opposed to being curative.[1] They were equally undeterred by the fact that no evidence was presented by Tidewater to establish that the surgical [sic] recommended by Dr. Henderson would be palliative, as opposed to curative. Tidewater's expert, Dr. Lazaro, never said that the surgical procedure would be palliative. His testimony was that he did not recommended [sic] that the procedure be performed, because he felt that the prospects of success were not good enough to offset the risk that it would precipitate a recurrence of the reflex sympathetic dystrophy.

Even if the jury could reasonably have found on the basis of Dr. Lazaro's testimony that the surgery recommended by Dr. Henderson would have been merely palliative, that is not tantamount to a finding that Plaintiff had reached maximum medical improvement, as Tidewater suggests. Dr. Lazaro's opinions and recommendations were based on his findings from his single examination of

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[1] The Fifth Circuit assumed that the jury must have been aware of that fact, since Webster's New Collegiate Dictionary defines cure as "to restore to health."

Plaintiff. Subsequent changes in Plaintiff's condition might have changed his opinion.

After the federal trial, Plaintiff's condition deteriorated progressively, demonstrating a need for prompt surgical intervention to prevent permanent, irreversible loss of function in Plaintiff's left hand. According to his treating physician, Dr. Darrell L. Henderson, the changes that he noted in Plaintiff's condition after the federal trial indicated that surgical intervention was medically necessary, that the risks associated with the procedure were outweighed by the potential benefits to be derived from it, and that the procedure was reasonably calculated to restore function and reduce disability in Plaintiff's left upper extremity, as opposed to being merely palliative. Dr. Henderson has further indicated that the changes that he noted in Plaintiff's condition were factors that a surgeon exercising the appropriate degree of professional judgment and providing the applicable standard of care would have taken into consideration in evaluating, or re-evaluating, Plaintiff's need for surgery.

Unfortunately, Tidewater turned a deaf ear and refused to engage in any further investigation of Plaintiff's need for medical treatment. It did not ask Dr. Lazaro or any other physician to re-evaluate Plaintiff's need for surgery and the potential benefits to be derived from it in light of the changes in his condition subsequent to the federal trial. Tidewater took the intractable position that the jury's finding that Plaintiff was not entitled to "further cure" on June 15, 1995 precluded Plaintiff from ever asserting another claim for cure and relieved it of the obligation to investigate such a claim. The jurisprudence clearly does not support that position.

In *Farrell v. United States*, 336 U.S 511, 69 S.Ct. 707, 1949 A.M.C. 613 (1949), the United States Supreme Court affirmed a judgment denying maintenance and cure to a seaman, who had been blinded and suffered post-traumatic convulsions, which were expected to become more frequent and could not be cured. The Court rejected arguments for making maintenance and cure permanent and held that the seaman was entitled to maintenance and cure "only until he was so far cured as possible." However, in doing so, the Supreme Court made the following observation:

> "Indeed the custom of providing maintenance and cure in kind and concurrently with its need has had the advantage of removing its benefits from danger of being wasted by the proverbial improvidence of its beneficiaries. *The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it.*" [emphasis added].

69 S.Ct. at 711.

Gilmore and Black summarized the Supreme Court's holding in *Farrell*, as follows:

> "Neither Taylor nor Farrell sets any time limit on the duration of the shipowner's liability, so long as there is a chance of improvement of the claimant's condition. The majority opinion in Farrell seems to take the position that 'cure' means improvement, or the possibility of improvement, and that Farrell could not recover medical expenses necessary to maintain him in

> his present condition without further deterioration; this petition was bitterly attacked by the four dissenting justices. On the other hand the majority opinion assumed (and with this the dissenting justices would have agreed) that if, at a future time, by reason of advances in medical knowledge, it should become possible to ameliorate Farrell's condition, he would then be entitled to an additional recovery. The shipowner's liability thus appears to be unlimited in time and can be revived, with respect to an apparently hopeless case, by new discoveries which make the resumption of treatment advisable." Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty*, Second Edition, § 6-11, pp. 299-300.

While the surgery that Dr. Henderson recommended after the federal trial was not a new form of treatment, subsequent changes indicated that its potential benefits were greater than Dr. Lazaro felt based on his single examination of Plaintiff in 1985. The reflex sympathetic dystrophy did not spontaneously resolve, as Dr. Lazaro suggested that it might. It got worse, as Dr. Henderson predicted that it would. The certainty that he would suffer the permanent, irreversible loss of use of his left upper extremity and permanent disabling pain should have been weighed against the possibility of improvement of function through surgery, which even Dr. Lazaro had acknowledged to be "worth a shot."

It is well-settled in the jurisprudence that in evaluating claims for maintenance and cure, all doubts must be resolved in favor of the seaman. *Vaughan v. Atkinson*, 369 U.S 527, 532, 82 S.Ct. 997, 1000, 8 L.Ed.2d 88 (1962); *Johnson v. Marlin Drilling Co.*, 893 F.2d 77 (5th Cir. 1990); *Noble Drilling Corporation v. Smith*, 412 F.2d 952, 958 (5th

Cir. 1969). The jurisprudence also clearly establishes that a Jones Act employer has a continuing obligation to investigate such claims. For example, in *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984), the Fifth Circuit affirmed an award of damages for wrongful failure to pay maintenance and cure even though the employer had had the seaman examined by four doctors, who could find nothing wrong with him. The court concluded that the jury had not erred in finding that the employer was arbitrary and capricious, because it refused to reinstate maintenance and cure or investigate further after receiving a report from a fifth doctor, who had diagnosed the seaman's ailment.

If a court's refusal to award future maintenance and cure was *res judicata*, as Tidewater contends, and such a finding relieved a Jones Act employer of the obligation to investigate subsequent claims, the Supreme Court's holding in *Farrell* would be rendered meaningless. An injured seaman would be forever barred from establishing that medical treatment was available, which could improve his condition. The end would [sic] result would be exactly what has occurred in this case. Because of Tidewater's recalcitrance, the opportunity to improve Plaintiff's condition and avoid permanent disability has been forever lost. He had a partially functioning hand, which was susceptible to being improved, but because he was denied the medical treatment that he needed, his hand is now frozen and atrophied, and it will eventually have to be amputated.

This is clearly not what the Supreme Court envisioned when it decided *Farrell*. Tidewater's position is at war with the fundamental principles underlying the

ancient remedy of maintenance and cure. The exception of res judicata should therefore have been denied.

## CONCLUSIONS

There is no evidentiary basis in the record before the Court for the District Court's judgment sustaining Tidewater's Exception of Res Judicata. No evidence was offered or introduced in support of the exception. Even if the attachments to the memoranda could properly be considered, they would be insufficient, because they do comprise the entire record in the first suit.

Even if Tidewater had presented evidence in support of its exception, the District Court would have been clearly wrong in concluding that the issues raised in this lawsuit had been adjudicated in the earlier federal proceedings. Plaintiff seeks damages resulting form Tidewater's wrongful failure to investigate his right to cure based on changes in his physical condition occurring after the federal trial. The federal jurisprudence recognizes his right to bring such a claim, which clearly could not have been adjudicated in the earlier suit. The judgment sustaining Tidewater's exception should therefore

be reversed and this matter remanded to the District Court for further proceedings.

Respectfully submitted,

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BY: /s/ Lawrence N. Curtis
LAWRENCE N. CURTIS
(4678)

**CERTIFICATE**

I HEREBY CERTIFY that the foregoing has this day been served upon all counsel of record by placing a copy of same in the United States mail, postage prepaid and properly addressed.

Lafayette, Louisiana this 22nd day of September, 1997.

/s/ Lawrence N. Curtis
LAWRENCE N. CURTIS

IN THE

SUPREME COURT OF LOUISIANA

NUMBER: _____

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THOMAS JOHNSTON

Plaintiff-Appellant

versus

TWENTY GRAND OFFSHORE, INC.,
TIDEWATER MARINE, INC. AND
PENTAL INSURANCE COMPANY, LTD.

Defendants-Appellees

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ON APPLICATION FOR WRITS OF CERTIORARI
OR REVIEW TO THE HONORABLE LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

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APPLICATION FOR WRITS OF
CERTIORARI OR REVIEW

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Attorneys for Plaintiff-Petitioner

* * *

## CONSIDERATIONS FOR GRANTING WRITS

This matter presents the first, second, fourth, and fifth considerations set forth in Rule X, Section 1(a) of the rules of this Court. The Court of Appeal's decision that Petitioner is forever barred from bringing an action for cure based on changes in his condition is inconsistent with the general maritime law of the United States, which has recognized the right of seamen to bring serial actions for maintenance and cure for more than fifty years, beginning with the decision of the United States Supreme Court in *Calmar Steamship Corp. v. Taylor,* 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed.993 (1938). Although there is clear guidance in the federal jurisprudence, this Court has not had occasion to decide the issue of whether serial actions for maintenance and cure may be brought. The Court should resolve the conflict between the Court of Appeal's decision and the federal jurisprudence.

The Court should also review the conflict between the trial procedures approved by the Court of Appeal and the decisions of this Court. The Court's ruling in *Economy Carpets Mfrs. & Distributors, Inc. v. Better Business Bureau of Baton Rouge, Louisiana, Inc.,* 319 So.2d 783, 786 (La. 1975) made it clear that all judgments must be based on evidence, which has been properly introduced into the record. The Court's decision in *Lamana v. LaBlanc,* 526 So.2d 1107, 1109 (La. 1988) made it equally clear that in ruling on an exception of *res judicata,* "[a]n evaluation of the issues actually litigated shall be determined not solely from the examination of the pleadings but by the examination of the entire record in the first suit." Nevertheless, in this case, the respondent Court of Appeals affirmed a

judgment sustaining the peremptory exception of *res judicata* despite the fact that no evidence whatsoever was introduced into the record, and the District Court was not provided the entire record of the first suit for review. This gross departure from proper judicial proceedings should be addressed by the Court.

* * *

On June 12, 1995, at the conclusion of the trial in the federal proceedings, the jury returned a verdict in which they awarded Petitioner compensatory damages, including future medical expenses, but no exemplary damages or cure. The federal district court subsequently entered judgment on the jury's verdict, and on April 23, 1997, the United States Court of Appeals for the Fifth Circuit affirmed the judgment in an unpublished *per curiam* decision. Petitioner's application for certiorari to the United States Supreme Court was denied.

Petitioner did not pray for any damages arising out of his initial injury on February 1, 1994 in his original Petition for Damages in these proceedings. The petition alleges that *subsequent to* the trial of the federal court proceedings, Petitioner's treating physician, Dr. Darrell Henderson, diagnosed a recurrence of reflect sympathetic dystrophy secondary to Petitioner's original injury. Despite repeated warnings from Dr. Henderson that Petitioner needed immediate surgical treatment to prevent a total loss of function in his left hand, Respondents steadfastly refused to authorize this necessary medical treatment, or to pay the future medical expenses, which were awarded by the jury in the federal proceedings. As a

result of his failure to receive prompt and adequate medical treatment, Petitioner's condition is now irreversible, and Dr. Henderson has assigned him a one hundred (100%) percent permanent, partial disability of his left upper extremity.

## ASSIGNMENTS OF ERROR

(1) The lower courts erred in failing to recognize that the seaman has a right to bring serial actions for maintenance and cure – a right which has existed in the general maritime law for more than fifty years, beginning with the decision of the United States Supreme Court in *Calmar Steamship Corp. v. Taylor,* 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993 (1938).

(2) The lower courts erred in failing to recognize that Petitioner's claim arises solely out of events that took place subsequent to the federal court's decision.

(3) The lower courts erred in failing to follow the prior decisions of this court and the respondent Court of Appeals regarding the necessity of admitting evidence and examining the entire record of the prior proceeding.

## SUMMARY OF ARGUMENT

The right of seamen to serial actions for maintenance and cure has been recognized in the general maritime law for more than fifty years. Nevertheless, the lower courts erroneously concluded that after a federal jury found that Petitioner was not entitled to "further cure" (in addition to the $89,000.00 in future medical expenses that he was awarded), he was forever barred from bringing another

action for cure. The federal jurisprudence recognizes that Petitioner had the right not only to seek additional cure based on changes in his condition, but also to claim damages resulting from the Respondents' wrongful failure to provide it. Petitioner's pleadings plainly alleged a cause of action based solely on events occurring after the federal court decision. Nevertheless, the Court of Appeal erroneously found that his cause of action was the same as the claim, which was adjudicated in the earlier federal proceedings.

The errors in the lower courts' decisions are attributable in part to the District Court's failure to employ proper trial procedures. This Court has clearly held that all judgments must be based on record evidence, and that in ruling on the peremptory exception of *res judicata*, the determination of the issues adjudicated must not be based solely on an examination of the pleadings but by the reviewing the entire record in the first suit. However, in this case, no evidence whatsoever was introduced into the record. Furthermore, the District Court was not provided the entire record of the earlier federal proceedings for review. As a result, a proper determination of the issues that were actually litigated in the earlier proceedings cannot be made from the record in this case.

## ARGUMENT

### I. The Lower Courts Erred in Failing to Recognize the Seaman's Right to Bring Serial Actions for Maintenance and Cure.

It is well-settled in the federal jurisprudence that a seaman may bring serial suits to collect maintenance and

cure as it becomes due. *Calmar Steamship Corp. v. Taylor,* 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993 (1938); *Lirette v. K & B Boat Rentals, Inc.,* 579 F.2d 968 (5th Cir. 1978). In consequence, there can almost never be a "final" judgment regarding a shipowner's liability for future cure. *Pelotto v. L & N Towing Co.,* 604 F.2d 396 (5th Cir. 1979). Even when the employer is authorized to discontinue cure payments, because the seaman's treating physician testifies that further treatment will probably not improve his condition, the seaman may later seek resumption of the payments, "if he can show adequate cause for such action." *Morales v. Garijak, Inc.,* 829 F.2d 1355, 1360 (5th Cir. 1987)

In *Farrell v. United States,* 336 U.S. 511, 69 S.Ct. 707, 1949 A.M.C. 613 (1949), the United States Supreme Court made it crystal clear that even after a judgment terminating cure on grounds that further treatment would not be curative, a seaman may bring a subsequent action, if he receives future treatment of a curative nature. The Supreme Court rejected arguments for making maintenance and cure permanent and held that the seaman was entitled to maintenance and cure "only until he was so far cured as possible." However, in doing so, the Supreme Court made the following observation:

> "Indeed the custom of providing maintenance and cure in kind and concurrently with its need has had the advantage of removing its benefits from danger of being wasted by the proverbial improvidence of its beneficiaries. *The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such*

> *treatment and for maintenance while receiving it."* [emphasis added].

69 S.Ct. at 711.

Gilmore and Black summarized the Supreme Court's holding in *Farrell,* as follows:

> "Neither Taylor nor Farrell sets any time limit on the duration of the shipowner's liability, so long as there is a chance of improvement of the claimant's condition. The majority opinion in Farrell seems to take the position that 'cure' means improvement, or the possibility of improvement, and that Farrell could not recover medical expenses necessary to maintain him in his present condition without further deterioration; this position was bitterly attacked by the four dissenting justices. On the other hand the majority opinion assumed (and with this the dissenting justices would have agreed) that if, at a future time, by reason of advances in medical knowledge, it should become possible to ameliorate Farrell's condition, he would then be entitled to an additional recovery. The shipowner's liability thus appears to be unlimited in time and can be revived, with respect to an apparently hopeless case, by new discoveries which make the resumption of treatment advisable."

Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty,* Second Edition, §§ 6-11, pp. 299-300.

In *Pelotto v. L & N Towing Co.,* 604 F.2d 396 (5th Cir. 1979), the Plaintiff brought a second action for maintenance and cure after obtaining a judgment in an earlier Jones Act and unseaworthiness suit. The district court sustained the Defendants' exception of *res judicata,* but

the United States Court of Appeals for the Fifth Circuit reversed, holding:

> "In applying the doctrines of *res judicata* and collateral estoppel to this suit for maintenance and cure, however, the District Judge failed to account for the peculiar nature of the maintenance and cure remedies. First, maintenance and cure for the future are ordinarily not awarded in a lump sum. The award may 'cover future maintenance and cure of a kind and for a period definitely ascertained or ascertainable. . . . ' *Calmar S.S. Corp. v. Taylor, supra,* 303 U.S. at 530-31, 58 S.Ct. At 654. Since the defendants were satisfying all of Pelotto's maintenance and cure claims as of the date of his initial trial, Pelotto's only possible maintenance and cure claims at that time would have been either (i) an action for definitely ascertainable *future* maintenance and cure – an action which defendants do not claim as possible, or (ii) an action asking for a declaration that payments be made until Pelotto reach maximum cure – an action of very doubtful utility to Pelotto. *See Lirette v. K & B Boat Rentals, Inc.,* 5 Cir., 1978, 579 F.2d 968, 970. Thus *res judicata* does not preclude the present action." *Id.* at 401.

Later, in *Morales v. Garijak, Inc.,* 829 F.2d 1355, 1360 (5th Cir. 1987), the Fifth Circuit again recognized the right of a Plaintiff in a Jones Act suit to bring a second action for maintenance and cure, holding:

> "Garijak shall continue to pay maintenance and cure until in the opinion of Morales's treating physician, additional treatment will probably not improve the condition of Morales's writ. At that time, Garijak may discontinue maintenance

> and cure payments~~,~~ *Subject to Morales's right, however, to seek a resumption of payments if he can show adequate cause for such action."* [emphasis added].

Despite this settled federal jurisprudence, the lower courts treated the federal jury's finding that Petitioner was not entitled to "further cure" as of June 12, 1995 as forever determinative of his right to cure. This cannot be logically reconciled with the seaman's right to bring serial claims for cure.

## II. The Lower Courts Erred in Failing to Recognize that Petitioner's Claim Arises Solely out of Events That Took Place After the Federal Court's Decision.

The Court of Appeal further erred in concluding that Petitioner alleged in his petition "that the failure of the defendants to approve and provide surgery for the plaintiff *from November 1994,* through November 1996, caused the plaintiff's left arm to reach a point where surgery would no longer benefit him." The original Petition for Damages in these proceedings alleges a tort-like claim for damages resulting from Tidewater's wrongful failure to provide cure *after* the judgment was rendered in the federal proceedings on June 12, 1995.

In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1511 (5th Cir. 1995) (on rehearing), the Fifth Circuit explained that there are two types of maintenance and cure actions:

> "The tort-like type involves a personal injury; i.e., *typically a worsening of the seaman's physical or mental health caused by the failure to provide*

*maintenance, or more likely, cure.* The contract-like type need not involve a personal injury (although it may); it need only involve the loss of a monetary outlay." [emphasis added].

In Paragraphs 17 and 18 of his original petition, Petitioner alleged:

17.

*From the date on which the federal trial of Plaintiff's claims against Defendant concluded through the present,* Plaintiff continually made demands upon Defendant for cure to treat his mental and physical injuries, arising out of the accident that occurred on February 1, 1994. Defendant refused to respond to these demands and to comply with its cure obligation.

18.

*From the date on which the federal trial of Plaintiff's claims against Defendant concluded through the present,* Plaintiff's mental and physical condition has continually worsened, deteriorated and been aggravated as a result of Defendant's refusal to provide Plaintiff with cure. In connection with Plaintiff's demands for cure, Defendant has been provided with all medical reports from Dr. Henderson and his treating psychologist, Michael Berard, Ph.D. Thus, Defendant was continually and systematically informed of the worsening, deterioration and aggravation of Plaintiff's mental and physical condition, but Defendant with great callousness and indifference failed and/or refused to provide Plaintiff with cure during this time period.

Petitioner specifically alleged that he was owed cure, because his conditioned worsened *after* the conclusion of the federal proceedings. As a matter of law, the federal jury could not have determined Petitioner's right to cure based on events which took place after the federal proceedings.

The damages that Plaintiff seeks do not arise out of the same transaction or occurrence as the damages that he was awarded in the earlier federal proceedings. He is not seeking general damages for the pain and suffering associated with his initial injury, nor is he seeking the cost of the surgical treatment that Dr. Henderson was recommending at the time of the federal trial. It is too late for that treatment now. He is therefore asking to be compensated for the permanent disability resulting from Tidewater's wrongful failure to provide it.

The occurrence, or series of occurrences, out of which his present claims arise is the repeated refusal of Tidewater to provide necessary medical treatment. The claims, which were litigated in the earlier federal court proceedings arose out of an entirely different occurrence – the accident on February 1, 1994 and the negligence and unseaworthy conditions, which gave rise to it.

Respondents argue that the federal judgment is nevertheless *res judicata,* because it reflects a jury finding that Petitioner had reached maximum medical cure. Respondents erroneously conclude that such a finding would bar a subsequent claim for cure. In the first place, there is no basis in the record of the federal proceedings for concluding that the jury found that Petitioner had reached maximum medical cure Furthermore, even if such a finding

could reasonably be attributed to the jury, it would not have the legal effect that Respondents suggest.

The jury interrogatory form that was used in the federal proceedings did not ask the jury to determine whether Petitioner had reached maximum medical improvement, and the answers to the interrogatories do not indicate that such a finding was made. In Interrogatory No. 7, the jury was asked in to determine the amount of Petitioner's future medical expenses. The $89,000.00 that the jury awarded for future medicals corresponds to Dr. Henderson's highest estimate of the cost of the surgical procedure that he was recommending. Later, in Interrogatory No. 10, the jury was asked "Do you find from a preponderance of the evidence that Tidewater Marine owes Thomas E. Johnston ***further cure*** for the injury to his arm?"

The jury had been cautioned by the trial judge that if they awarded medical expenses under Petitioner's Jones Act or unseaworthiness claims, they could not give him double recovery by also awarding those amounts under his cure claim. In light of that cautionary instruction, the jury in all likelihood interpreted the question regarding "further cure" to mean medical expenses ***in addition to*** the $89,000.00 that had already been awarded. Nevertheless, the federal district court and the Fifth Circuit chose to reconcile the jury verdict by attributing to the jury a finding that the surgery recommended by Dr. Henderson would be merely palliative.

The federal courts were unconcerned by the fact that the jury had not been informed that cure could not be awarded if it was merely palliative, as opposed to being

curative.[1] They were equally undeterred by the fact that no evidence was presented by Respondents to establish that the surgical [sic] recommended by Dr. Henderson would be palliative, as opposed to curative. Respondents' expert, Dr. Lazaro, never said that the surgical procedure would be palliative. His testimony was that he did not recommended that the procedure be performed, because he felt that the prospects of success were not good enough to offset the risk that it would precipitate a recurrence of the reflex sympathetic dystrophy.

Even if the jury could reasonably have found on the basis of Dr. Lazaro's testimony that the surgery recommended by Dr. Henderson would have been merely palliative, that is not tantamount to a finding that petitioner had reached maximum medical improvement, as Respondents suggest. Dr. Lazaro's opinions and recommendations were based on his findings from his single examination of Petitioner. Subsequent changes in Petitioner's condition might have changed his opinion.

After the federal trial, Petitioner's condition deteriorated progressively, demonstrating a need for prompt surgical intervention to prevent permanent, irreversible loss of function in Petitioner's left hand. According to his treating physician, Dr. Darrell L. Henderson, the changes that he noted in Petitioner's condition after the federal trial indicated that surgical intervention was medically necessary, that the risk associated with the procedure were outweighed by the potential benefits to be derived

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[1] The Fifth Circuit assumed that the jury must have been aware of that fact, since Webster's New Collegiate Dictionary defines cure as "to restore to health."

from it, and that the procedure was reasonably calculated to restore function and reduce disability in Petitioner's left upper extremity, as opposed to being merely palliative. Dr. Henderson has further indicated that the changes that he noted in Petitioner's condition were factors that a surgeon exercising the appropriate degree of professional judgment and providing the applicable standard of care would have taken into consideration in evaluating, or re-evaluating, Petitioner's need for surgery.

Unfortunately, Respondents turned a deaf ear and refused to engage in any further investigation of Petitioner's need for medical treatment. They did not ask Dr. Lazaro or any other physician to re-evaluate Petitioner's need for surgery and the potential benefits to be derived from it in light of the changes in his condition subsequent to the federal trial. Respondents took the intractable position that the jury's finding that Petitioner was not entitled to "further cure" on June 15, 1995 precluded Petitioner from ever asserting another claim for cure and relieved it of the obligation to investigate such a claim. The federal jurisprudence clearly does not support that position.

While the surgery that Dr. Henderson recommended after the federal trial was not a new form of treatment, subsequent changes indicated that its potential benefits were greater than Dr. Lazaro felt based on his single examination of Petitioner in 1985. The reflex sympathetic dystrophy did not spontaneously resolve, as Dr. Lazaro suggested that it might. It got worse, as Dr. Henderson predicted that it would. The certainty that he would suffer the permanent, irreversible loss of use of his left upper extremity and permanent disabling pain should

have been weighed against the possibility of improvement of function through surgery, which even Dr. Lazaro had acknowledged to be "worth a shot."

It is well-settled in the jurisprudence that in evaluating claims for maintenance and cure, all doubts must be resolved in favor of the seaman. *Vaughan v. Atkinson*, 369 U.S. 527, 532, 82 S.Ct. 997, 1000, 8 L.Ed.2d 88 (1962); *Johnson v. Marlin Drilling Co.*, 893 F.2d 77 (5th Cir. 1990); *Nobel Drilling Corporation v. Smith*, 412 F.2d 952, 958 (5th Cir. 1969). The jurisprudence also clearly establishes that a Jones Act employer has a continuing obligation to investigate such claims. For example, in *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984), the Fifth Circuit affirmed an award of damages for wrongful failure to pay maintenance and cure even though the employer had had the seaman examined by four doctors, who could find nothing wrong with him. The court concluded that the jury had not erred in finding that the employer was arbitrary and capricious, because it refused to reinstate maintenance and cure or investigate further after receiving a report from a fifth doctor, who had diagnosed the seaman's ailment.

If a court's refusal to award future maintenance and cure was *res judicata*, as the lower Courts have found, and such a finding relieved a Jones Act employer of the obligation to investigate subsequent claims, the Supreme Court's holding in *Farrell* would be rendered meaningless. An injured seaman would be forever barred from establishing that medical treatment was available, which could improve his condition. The end would [sic] result would be exactly what has occurred in this case. Because of Respondents' recalcitrance, the opportunity to improve

Petitioner's condition and avoid permanent disability has been forever lost. He had a partially functioning hand, which was susceptible to being improved, but because he was denied the medical treatment that he needed, his hand is now frozen and atrophied, and it will eventually have to be amputated.

This is clearly not what the Supreme Court envisioned when it decided *Farrell*. The lower courts' position is at war with the fundamental principles underlying the ancient remedy of maintenance and cure. The exception of *res judicata* should therefore have been denied.

**III. The Lower Courts Erred in Failing to Follow the Prior Decisions of this Court and the Respondent Court of Appeal Regarding the Necessity of Admitting Evidence and Examining the Entire Record of the Prior Proceeding.**

In addition to failing to properly construe the legal and factual nature of the claim asserted, the Court of Appeal failed to apply the decisions of this Court and its own prior jurisprudence

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Respondents' exception should therefore be reversed and this matter should be remanded to the District Court for further proceedings.

WHEREFORE, Petitioner prays that this Court grant writs of certiorari or review to review the judgment of the respondent Court of Appeal affirming the judgment of dismissal rendered by the District Court. Petitioner further prays that the District Court's judgment be reversed,

vacated, and set aside, and that judgment be rendered in his favor, overruling the peremptory exception of *res judicata* and remanding this matter for further proceedings.

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